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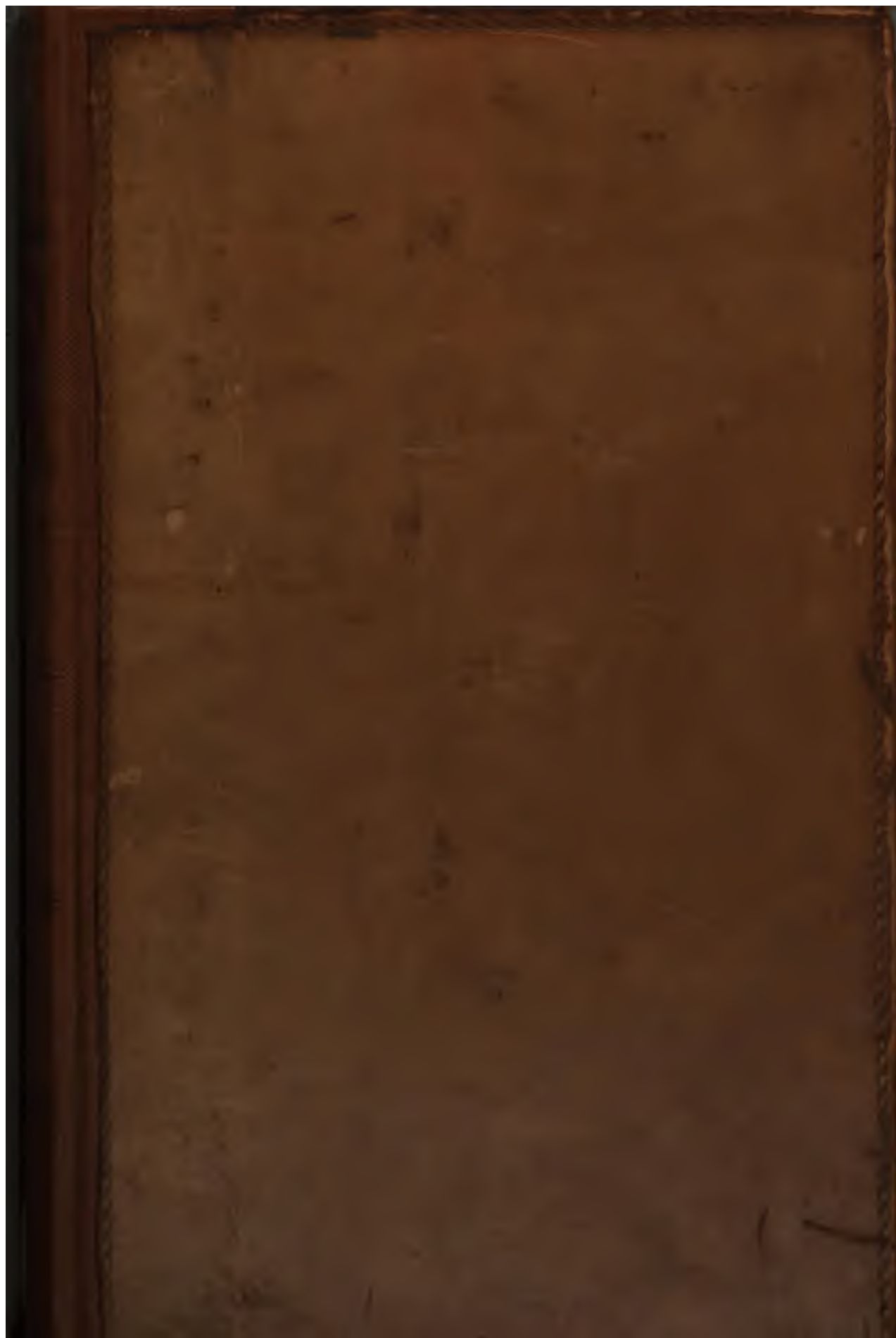
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REPORTS

OF

CASES

RULED AND DETERMINED AT

Nisi Prius,

[IN THE COURT OF

Common Pleas,

AND ON THE

NORTHERN CIRCUIT;

FROM THE

Sittings after TRINITY TERM, 55 GEO. III. 1815,

TO THE

Sittings after MICHAELMAS TERM, 58 GEO. III. 1817,

BOTH INCLUSIVE.

To which are added,

COPIOUS NOTES UPON THE MOST IMPORTANT SUBJECTS OF
COMMERCIAL AND GENERAL LAW.

By FRANCIS LUDLOW HOLT,

OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

[VOL. I.]

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AND J. COOKE, ORMOND-QUAY, DUBLIN.

1818.



P R E F A C E.

IN the following Reports of decisions at *Nisi Prius* it will be seen that the Writer has endeavoured, (he hopes not fruitlessly,) to render them more generally useful to the profession. In reporting the decisions in the several Cases, he has attempted to explain the principles upon which they are founded; and, according to the best of his judgment and industry, to connect them with the system of which they are part.

It is not usual, and scarcely possible, for the Judges at *Nisi Prius*, in the vast multitude of *Cases* brought before them, to do more than touch upon the principles of the *Cases* in point; and, still less, to unfold the system of law, of which such *Cases* are but individuals.—In the form of Notes, the Writer has endeavoured to supply this connection and exposition. The very limits of a Note necessarily require the condensation of the subject matter into points; and

though this form of writing may not be the most elegant, and necessarily presumes a good degree of elementary knowledge in the Reader, it is scarcely requisite to inform the Student in the Law that, when appended to decided cases, it is most useful for memory, reference, and study.

In this attempt the Writer feels that he has to contend with the salutary prejudice always existing against innovation in any thing deemed established. But as utility is certainly a very sufficient reason for departing from an usage, it is the interest of the profession not always to discourage it; and the attempt must be made in order to give a chance for improvement.

In stating the Cases, the Writer has deviated somewhat from that abstract and axiomatic way, which, though justly entitled to the praise of forcible condensation, and elaborate precision, with respect to the subject matter, has too often fallen into obscurity, by the omission of material points. To avoid this defect, the Writer has stated, with such fulness as to render misconception impossible, both the narrative of the case, the main argument of Counsel, and the observations of the Judge in pronouncing his decision. He is under little apprehension but that this part of the Reports will meet with the approbation of the Profession.

In the present state both of our Law and Commerce, the Writer deems it unnecessary to say any thing of the importance of the decisions of *Nisi Prius* to the profession and the country. They are, in fact, the law of trade and commerce as seen in the practice of the Courts. The whole commercial dealings of the country are herein brought before the Courts, and discussed in the first instance. The Law is explained and administered by Judges who, without departing from its necessary certainty, have extended principles so as to embrace the new forms of commerce. The law learning of a former age ran in the channel of real property. The changing circumstances of the times have introduced another equally powerful source, and extensive object, of national wealth and dealing. The law has necessarily followed this change.

It may indeed be a question for the impartiality of future times, whether the learning, precision, and accuracy—the compass given to principle without violating fixed rules, and the reconciliation of the substantial justice of the Courts of Equity with the strictness of the maxims of the common law, (introduced within these last fifty years) be not entitled even to greater praise, than the subtle logic of earlier times as applied to cases of real property.

Paper Buildings, Temple,
March 3, 1818.

ERRATA.

Page 6. In *Holland v. Jourdine*, in the fourth line of the text, for "defendant," read "plaintiff." And in line 17, substitute likewise the word "plaintiff," for "defendant."

Page 20, line 21. For "defendant," read, "plaintiff."

Page 95. In the marginal note, instead of "Held that B. could not, &c." read, "Held that A. could not, &c."

Page 172. In *Cumming v. Roebuck*, in the marginal note, instead of "he cannot object," read, "the defendant cannot object."

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CASES

ARGUED AND DETERMINED AT

NISI PRIUS

IN THE

COURT OF COMMON PLEAS.

FIRST SITTINGS AFTER TRINITY TERM
AT WESTMINSTER, 55 GEO. III. 1815.

EVEREST *v.* GLYN, Bart.

Thursday,
June 15.

ASSUMPSIT by the steward of the manors of *Ewell and Cuddington*, in the county of *Surrey*, against the defendant, for fees claimed to be due for his admission to six separate copyhold estates, under the will of his father.—Plea the general issue, and 20*l.* paid into Court.

In an action by the steward of a manor for a particular rate of fees claimed to be due to him from a tenant on his admission to six several copyhold estates, if he fail to establish a custom for his charges, he may, notwithstanding, resort to a *quantum meruit*.

The plaintiff had been charged with distinct and entire fees for his admission to the several copyhold estates. Six admissions had been entered upon the Court-rolls, copies of which had been made forward by the Court, that where a person is admitted to several distinct copyhold tenements, the steward of the manor is not entitled, without proving a custom, to full fees on each admission, separately; but he may stand on his *quantum meruit*.

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by the steward, and accepted by the defendant's attorney; each admission was written on a separate parchment, and had its proper stamp affixed. The charges were, for the first admission, 8*l.* 3*s.* 2*d.*; and for the remaining five, 6*l.* 1*s.* 2*d.*, severally. The estates were holden by different quit rents, and upon some of them a heriot was reserved. There was no evidence of any custom in the manors to warrant the charges in question. A witness was called who acted as steward for twelve different manors; he stated that the custom was, when a tenant was admitted to several estates under one title, to recite the title at length in the first admission, and then to enumerate the different estates to which the tenant was admitted at the same time, reciting the particular quit rents and service attached to each. If the recital were long, and it became necessary to abstract and copy deeds, his custom was, to charge 1*s.* per folio, in addition. Being shewn the plaintiff's bill of charges, he pronounced them to be excessive; and he said, that he should have charged 6*l.* 5*s.* for the first admission, and 8*s.* 8*d.* for the subsequent ones; that he should have included them all in one parchment, and affixed one stamp. He thought 20*l.* a reasonable recompence to the plaintiff.

Lens and *Bosanquet*, serjeants, for the defendant, made two objections: First, That the plaintiff was not entitled to charge distinct and entire fees for each admission. Secondly, The rate of charge. This question affected all the copyhold property in the kingdom. The most reasonable course was, to admit the tenant generally, reciting his title,

whether by descent or purchase, in the first admission, with an "*And also,*" to such other estates as he claimed in the same right. This was proved by one of the plaintiff's witnesses. It is strictly equitable; for where a copyholder is admitted to several copyholds under a will, as in the present case, he only takes one estate. The fees, moreover, depend upon the custom of the manor: the custom, with respect to fees, is as much the life of copyhold as any other custom. In the absence of all custom, the steward may resort to a *quantum meruit*; but the plaintiff is bound to prove, either that a particular custom did exist to warrant the charges; or that there was no custom on the subject in the manor; which would let in a calculation of charges agreeable to equity and reason. They cited a MS. case, before Lord Kenyon, in Hilary Term, 29 G. 3. *Searle v. Marsh*, in which his Lordship determined, that where there were separate copyholds, claimed in one right, the admissions should be separate, and not blended; nevertheless, to warrant a distinct and entire charge for the separate admissions to each, a custom should be shewn; and, upon the ground of custom only, would he permit the plaintiff to recover. With respect to the several stamps, all might be affixed to one copy; and as the death was only once presented, proclamation once made, and the other ceremonies of admission once gone through, it would be sufficient to consolidate them into one entire charge upon the first admission, adding a moderate sum for the enumeration of the other estates to which the tenant was admitted at the same time.

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Best, serjeant. The attorney has received the separate admissions in Court. He cannot afterwards dispute them. *Searle v. Marsh* only decided that where there was a custom it must be followed. The defendant has not proved a custom to controul the plaintiff's charges; therefore the plaintiff may resort to a *quantum meruit*. *At-tree v. Scutt*, 6 East, 476. It is the duty of the steward to make separate admissions, and consequently he must be paid. In the case cited, Lord Kenyon thought the admissions should be separate, and the custom gave the fees.

GIBBS, C. J. This case is most important as it affects the interests of copyholders. The defendant has succeeded to certain copyholds on his father's death: his title cannot be perfected without admission: and he must receive a copy of those admissions for the convenience of disposing of his property, if so inclined. The steward is the proper officer to enter the admissions, and to deliver them out to the party; and he is entitled to a reasonable compensation for his trouble. This compensation may be regulated by custom; or, in the absence of custom, by principles which vary with circumstances and times. No evidence has been given to shew the custom of this manor, in regard to the steward's fees. But it is said, the plaintiff cannot recover upon the *quantum meruit*. The defendant, by paying money into Court, has answered this objection; but I am of opinion, that if the plaintiff do not prove a custom, he may, notwithstanding, resort to a *quantum meruit*. Whether the plaintiff be entitled to charge distinct and entire

fees for each admission is a question of law. I shall leave it to the Jury to say what will be a reasonable compensation to the plaintiff for the admissions, if entitled to make out separate admissions to each estate. And it will remain on my note to state to the Court for their opinion, whether the plaintiff be entitled to distinct and entire fees for each admission.

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The Jury found 20*l.* a reasonable compensation to the plaintiff, if entitled to make out separate admissions; but if entitled to charge separate fees for each admission, they found a verdict, with 10*l.* damages for the plaintiff.

Best, serjeant, and *Bowen*, for plaintiff.

Lens and *Bosanquet*, serjeants, for defendant.

[Attornies, *Redd* and *Williams*.]

In the ensuing *Michaelmas* Term this case was moved on behalf of the plaintiff, and a rule *Nisi* obtained. The Chief Justice delivered the opinion of the Court:—That the plaintiff was not entitled to distinct and entire fees on each admission separately, but that he was entitled to stand, and must stand, entirely on his *quantum meruit*. The Rule was discharged.

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June 15.

HOLLAND v. JOURDINE.

After action brought, the defendant pays the plaintiff the debt and costs in the cause, and takes a receipt for the same. The plaintiff nevertheless proceeds in the action, and the defendant pleads the general issue. The receipt is no defence under this plea, and plaintiff is entitled to nominal damages.

THIS was an action to recover the amount of an attorney's bill; plea the general issue. The defendant's counsel admitted the bill to be due, and the defence was, a receipt given by the defendant after action brought for the debt and costs in the cause.

Onslow, serjeant, for the plaintiff, contended, that it was not evidence under the general issue; the receipt having been given after action brought. The mode of taking advantage of such payment must be, by an application to the Court, or a special plea.

Best, serjeant, for the defendant, admitted that payment after action brought could not be given in evidence under the general issue; but, in the present case, the debt and costs are included in the receipt which the defendant gives.

GIBBS, C. J.—It is no answer to the action under the general issue. The defendant might have applied to the Court. The Court of King's Bench have suffered what has passed between suing out of the writ and filing the declaration to be given in evidence without pleading it. But the payment of debt and costs, which arises after action brought, should be introduced by plea. The plaintiff, however, can only claim nominal damages.

The cause was afterwards referred.

Onslow, serjeant, and *Manley*, for the plaintiff.

Best, serjeant, for the defendant.

[Attornies, *Holland* and *Guy*.]

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If after action brought, and before declaration, the defendant offers to pay debt and costs, and the plaintiff refuses to receive it, the Court will permit the defendant to pay into Court the debt and the costs up to the time of his offer only. And the plaintiff will be compelled to pay the costs of the application, and all costs in the action subsequent to the offer. *Seevin v. Cowell*. 2 W. P. Taunt. 203. money can regularly be paid into Court, a tender is made of a sum for damages, with costs up to that time, and refused, the Court will, on motion, permit that sum to be paid into Court, and struck out of the declaration, and will order all subsequent costs to be paid by the plaintiff, although the plaintiff goes for other causes of action than those on which the sum is tendered. *Roberts v. Lambert*. 2 W. P. Taunt. 283.

In the same manner, if after action brought, and before

HORSEFALL v. MATHER.

June 15.

THIS was an action of assumpsit brought against the defendant, who had been tenant from year to year to the plaintiff, for dilapidations and injury to the premises recently in his occupation. The declaration stated, that in consi-

Tenant at will is not liable to general repairs; he is bound to use the premises in a husband-like manner, but no farther.

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deration that the defendant had become and was tenant to the plaintiff of a certain messuage, &c. he undertook to keep the same in good and tenantable repair; to uphold and support, and to deliver up the same to the plaintiff at the expiration of his term, in the condition in which he received it.

It appeared that the defendant had occupied the house about three years at a rack rent. It was in good repair when he entered it; but, upon quitting possession, he had in some degree damaged the ceiling, the walls, and other parts of the house, by removing the shelves and fixtures, and had not left the house in a good tenantable condition. The plaintiff had been put to some small expence in refitting it for the occupation of a new tenant. The plaintiff gave no other evidence than the occupation of the premises by the defendant.

Lens, serjeant, for the plaintiff, contended, that there was a general assumpsit in law, founded in the relation of landlord and tenant, that the latter should keep the premises in tenantable condition; and that this obligation attached upon a tenant from year to year, or a tenant at will. He relied upon *Ferguson v. Black*. 2 Esp. N. P. 590.

Best, serjeant, *contrà*. The declaration states the implied assumpsit in terms too large. This is an extensive obligation, which, in the absence of a specific contract, does not result from the relation of landlord and tenant. An implied promise to conduct himself as a good tenant is very different

from an implied promise to keep premises in repair, to uphold and maintain them, and to surrender them, at the expiration of the tenancy, in that condition.

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GIBBS, C. J.—I am of opinion that the plaintiff is not entitled to recover. He has laid his ground too broadly. The defendant is answerable to some extent, but not to the extent stated in the declaration. Can it be contended that a tenant at will is answerable if premises are burned down—would he be bound to rebuild if they became ruinous by any other accident? And yet, if bound to repair generally, he might be called upon to this extent. He is bound to use the premises in a husbandlike manner; the law implies this duty and no more. I am sure it has always been holden that a tenant from year to year is not liable to general repairs.

Plaintiff nonsuited.

Lens, serjeant, and *Stanley*, for plaintiff.

Best, serjeant, for defendant.

[Attornies, *Geldard* and *Wells*.]

The Lord Chief Justice cited a MS. case, on the Western Circuit, in which Mr. Justice *Buller* had expressed the same opinion.

The mere relation of land

lord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner. *Powley v. Walker*. 5 Term Rep. 373.

Although an action on the

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MATHER.

case may be maintained against a tenant for commissive or wilful waste, no action can be maintained for permissive waste only. *Gibson v. Wells*. 1 New Rep. 291. In this case, Sir *James Mansfield*, C. J. says, "There is no doubt but an action on the case may be maintained for wilful waste; but at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable, such an action might be brought against a tenant at will, who omitted to repair a broken window. I think this action is an innovation, and I am not disposed to encourage it."

June 15.

SPRATLEY v. Sir H. WILSON, Knt.

Quære, whether a gift of a chattel, not in the possession of the donor at the time of making the gift, will so pass the property therein, as to entitle the donee, who has never obtained possession, to maintain trover against the executor of the donor.

If A. on his death-bed, desire B. to call at a certain place, and fetch away a watch, adding, "that he will then make her a present of it;"

but no possession is resumed by A. and no delivery made to B. **Quære**, if this would be good as a *donatio mortis causa*.

TROVER for a watch : plea, the general issue. The defendant was the executor of a gentleman of the name of *Wright*, who, in his life-time, had lodged with the plaintiff. The day immediately preceding his death, whilst the plaintiff was at his bed-side, he said to her, "I have left a watch at Mr. *R——*'s, at Charing-cross; fetch it away, and I will make you a present of it." The defendant had obtained the watch after the death of Mr. *Wright*, and this action was brought to recover it.

Best, serjeant, for the plaintiff, relied on a passage in *Brookes' Abridgment—Trespass*, 303, in which it is stated, if A. give a thing to B., which

is at York, and a stranger take it, B. may maintain trespass for it. He took the distinction: if a man be in possession of a watch at the time he gives it, unless he hands it over, it will not pass to the donee.

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v.
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Lens, serjeant, *contra*. In the case in *Brookes*, trespass might well be maintained, because trespass can be maintained upon a special property against a wrongdoer; but the case does not go to the extent, that the original owner, or those who represent him, might not reclaim the gift by an action of trover.

Upon further enquiry it appeared, that at the time of the gift, Mr. *Wright* was sensible of approaching death.

GIBBS, C. J.—I will not determine whether a personal chattel can pass by this mode of gift. It is not necessary to the present question. But is not this good as a *donatio mortis causa*? The donor has the apprehension of death upon his mind: I am inclined to think it good upon this ground. It is not, however, a case of frequent occurrence.

His Lordship directed the Jury to give a verdict for the plaintiff, and gave the defendant's counsel leave to move; if, upon inquiry, they thought there was any thing in the case.

Best, serjeant, and *D. Pollock*, for plaintiff.

Lens and *Copley*, serjeants, for the defendant.

[Attornies, *Pocock and Barley*.]

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This case was not afterwards moved.

The passage in Brookes' Abridgment is as follows:— If the owner of goods, which are at York, give them to J. S. who at the time of the gift is in London, and before J. S. have obtained the actual possession of the goods, a stranger takes them, J. S. may maintain an action of trespass against the stranger; for by the gift he acquired a general property in the goods. Bro. Tresp. 303. Latch. 214. But there is no case which goes to the extent of stating, that the donor, or his representatives, might not retract a gift unaccompanied with possession.

A true and proper gift is always accompanied with delivery of possession, and takes effect immediately; as if A. gives to B. 100*l.* or a flock of sheep, and puts him in possession, it is then a gift executed in the donee; and it is not in the donor's power to retract it; though he did it without consideration or recompence. Jenk. 109. Unless it be prejudicial to creditors, or the donor were under any legal incapacity; or if he were drawn in, circumvented, or imposed upon. But if the gift do not take effect by delivery of immediate possession, it is then

not properly a gift, but a contract, which wanting the natural equivalent or correlative, a good consideration, the donor cannot be enforced to perform it.

The *donatio causa mortis*, a title of the Roman law, is a gift by a person, believing himself to be at the point of death, to the donee, conditional upon the death of the donor; that is to say, if the donor die, the donee is to take it in preference of any other. If the donor recover, the donation does not so much revert, as not pass. According to the best commentators on the Roman law, it is not an essential part of this form of gift, that the donor should be actually in a state of dying; it is enough, says *Vinnius*, if he be moved to it, *sola cogitatione mortalitatis, ex sorte humana*. But it is essential that the donor should express the condition of the gift not passing whilst he lives; otherwise it would be a donation of another kind; namely, a *donatio inter vivos*. The best authorities in our law, in adopting the Roman title, have adopted with it the above large interpretation of the commentators; extending the title and the legal qualities of it, to the general consideration of mortality. *Stu*

v. *Chapman*, 2 Bro. C. R. 612. But, being a gift, there must be an actual delivery by the donor in his life-time. *Hedges v. Hedges*, Prec. in Chanc. Lord Cowper's expression was, "gives with his own hands." *Shargold v. Shargold*, 2 Ves. 431. "The delivery must be actual; a symbolical delivery will not do." Thus a delivery of receipts for S. S. Ann. made in the donor's last illness, and expressly in con-

templation of death, was held by Lord *Hardwicke* not to be a good *donatio mortis causa*. S. C. The donee must have immediate possession of the gift, and uncontroled dominion over it. Per Lord *Kenny*, C. J. *Hawkins v. Blewitt*, 2 Esp. 663. Acc. *Smith v. Smith*, 2 Strange 995.

Gifts, in any form, are justly not in favour with the English law; being necessarily vague, and too much open to fraud.

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ADJOURNED SITTINGS AFTER TRINITY TERM,
55 GEO. III. IN LONDON.

BACK and Another, Assignees of BURROUGH and
WYNNE v. GOOCH. June 23.

THIS was an action brought to recover a sum of money which the plaintiffs contended the defendant had received from the bankrupts previous to their bankruptcy, in fraudulent preference of the other creditors.

The act of bankruptcy and the petitioning creditor's debt were disputed.

The alleged act of bankruptcy was an assignment made by the bankrupts, bearing date the

commission, and is estopped, and having assented to the deed, though he did not execute it, he cannot set it up as an act of bankruptcy.

If the petitioning creditor be privy and assenting to the execution of a deed by traders, by which they make an assignment of all their property, though such assignment be fraudulent, and an act of bankruptcy, upon which other creditors, not privy and assenting, may sue out a

did not execute

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13th *June*, 1813, of all their property to trustees for the interest of their creditors; in which deed was contained a provision, that unless all their creditors, whose debts respectively amounted to 30*l.*, should come in under the terms of the deed by the 10th of *January*, 1814, the deed should be void. The bankrupts themselves had executed the deed; but the trustees had not executed it, nor was it signed by any creditor.

It appeared that the petitioning creditor, together with other creditors of the bankrupts, had employed an attorney in the country to bring actions against them; and the country attorney employed an agent in London, with whom the bankrupts were in negotiation for the arrangement of their affairs. The proposal of the deed of assignment originated in communications between the London agents and the bankrupts. The petitioning creditor knew of the assignment which the agents were preparing, and he frequently called whilst it was in progress, and expressed no disapprobation. When it was executed by the bankrupts, he recommended a person to the trustees to take possession of the stock of the bankrupts, but he did not execute the deed himself.

The *Solicitor General* and *Onslow Serjeant*, for the defendant, contended that this was no act of bankruptcy. It is true the bankrupts convey by this deed all their property to trustees; but, in order to constitute an act of bankruptcy, such conveyance must be an operative and valid assignment; that is to say, the property must pass out

of the bankrupts and vest in other persons, subject of course to be impeached upon the principles of the bankrupt laws; but in every other point of view it must be a valid assignment. There were three parties to this deed: 1st, the bankrupts; 2d, the trustees; 3d, the creditors. It is executed by the bankrupts, but it is not executed by the trustees, nor is it signed by any of the creditors; but the deed contains covenants on the part of the trustees which are a consideration for the assignment made by the bankrupts. Till the trustees, therefore, execute the deed, the conveyance is only *in fieri*; it is the inception of an assignment, and nothing more. When the trustees execute the deed it is operative, though no creditor come in. This case falls within the principle of *Bamford v. Baron*, 2 Term Rep. 594. A creditor who executes a fraudulent deed of assignment, which constitutes an act of bankruptcy, cannot avail himself of such assignment as an act of bankruptcy. It is an estoppel to him; any other creditor may insist upon it as an act of bankruptcy, but he is *particeps criminis*; he induces the act, and it is the policy of the law to prevent a person who tempts the bankrupt to commit an offence from setting it up as an act of bankruptcy.

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Lens, serjeant, and *Spankie*, *contra*.

This case does not fall within the principle of *Bamford v. Baron*. That case was determined on the ground that the party executed the deed, and having become a party to the instrument, it was not open to him to impeach it. The assent to the

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deed is nothing ; it is the execution of it which estops the party, and prevents his setting it aside. The true ground is, not that he tempts the trader to commit an act of bankruptcy, but that he shall not be permitted to set up as fraudulent, a deed which he himself executes. With respect to the objection that the trustees did not execute the deed, they insisted, that their formal execution was immaterial, inasmuch as they acted upon it.

GIBBS, C. J.—Following up the principle of *Bamford v. Baron*, I am of opinion that the petitioning creditor cannot avail himself of the execution of this deed as an act of bankruptcy. The deed is a conveyance of all the property of the bankrupts to trustees, and such a deed is void in law, upon this principle, that it takes the affairs of the trader out of his own hands and commits them to the management and controul of other persons. The law will not permit this to be done with a view to defeat the operation of the bankrupt laws. Such a deed, therefore, cannot stand. Many acts done by a trader are void, which are not, therefore, acts of bankruptcy. If a trader deliver over all his goods to trustees by *parole*, such a delivery will be void upon principle ; but it is no act of bankruptcy, because it is not within the words of the statute 1 James 1. c. 15. The statute intends a fraudulent conveyance, and it is because the conveyance is fraudulent that it constitutes an act of bankruptcy. But the law says, that it cannot be insisted upon as fraudulent by those who assent to it. A creditor, not privy or assenting, may sue out a commission upon it ; but none can do it but

those against whom the deed is fraudulent. The principle of *Bamford v. Baron* was this, that those who assent to a deed shall not be permitted to impeach it as fraudulent, and if not fraudulent, it is no act of bankruptcy. I say nothing as to the objection that the trustees did not execute the deed. It is besides the present question; but the petitioning creditor having assented to that deed as far as it went, cannot now object to such deed as fraudulent.

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Plaintiffs nonsuited.

Lens, serjeant, and *Spankie*, for plaintiffs.

The *Solicitor General* and *Onslow*, serjeant, for defendants.

[Attornies, *Windus* and *Holloway*.—*Abbott*.]

Such estoppel, it seems, applies only to the petitioning creditor, 4 East, 235. Therefore, if a commission be sued out upon such a deed, upon the petition of a creditor who has not concurred in it, and who, together with others who had concurred in it, was chosen assignee, it is no objection to an action brought by them, as assignees, that some of them had concurred in such deed. *Tappendall* and others v. *Bergus*, 4 East, 230. An as-

signment by partners, by deed, of all their property, in trust for their creditors, with a proviso to be void, if all their creditors for above 20*l*. should not execute, or a commission of bankrupt should issue within a certain time, is an act of bankruptcy. *Dutton v. Morrison*, 1 Rose. Cases in Bankruptcy, 213. And such a deed is operative, though it contained a proviso to be void if the trustees think fit. 4 East, 230.

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June 24.

WITHERS and Others v. Lys and Another.

An order sent by the vendor to the wharfinger to deliver the goods to the vendee, is sufficient to pass the property to the vendee, provided nothing remains to be done but to make the delivery; but if *any thing* remain to be done, for example, weighing, &c. the property does not pass, and the right of stoppage in transitu is not defeated, till *that* be done.

THIS was an action of trover brought to recover a quantity of rosin.

The plaintiffs had sold, through the medium of their broker, thirty tons of rosin to one *Bromer*, before his bankruptcy. The broker's note was as follows :

" Messrs. *Withers* and Co. Sept. 2d, 1812.— I have this day sold to *David Bromer* thirty tons of London made rosin, more or less, at 13s. *per cwt.* lying in mats at the wharf of *Lys* and Co. payment by a bill at six months."—Signed by the broker.

On the 21st of *September* the plaintiffs sent an order to the defendants, who were wharfingers (and which order they entered in their books) to weigh and deliver the rosin ; upon which they gave notice to *Bromer* that they had received such order from the plaintiffs. Shortly afterwards *Bromer* became insolvent, and the rosin still lying at the wharf, the plaintiffs gave them notice not to deliver it. No bill of exchange had been given by *Bromer*.

The question was, whether delivery had taken place. There had been a suit in Chancery relative to the property, and the *Master of the Rolls*

had advised an action, and recommended the case to be tried upon admissions.

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The *Solicitor General* and *Taddy*, for the defendants, contended, that in the present case the property passed to *Bromer*, and that the plaintiffs, the vendors, had lost their right of stoppage in transitu. When the order was sent to the wharfingers, and they entered it, the property was immediately divested out of the plaintiffs. It is true, indeed, that the order was to weigh and deliver, &c. But this would not bring the case within the principle of those cases, which had been decided upon the ground that weighing was necessary, in order to ascertain and distinguish the quantities which the vendee claimed. Here the rosin was lying in mats; it had been sold *as thirty* tons, more or less. The weighing, therefore, was not necessary to constitute the delivery, because the mats were to be delivered, whether they contained *more or less*. It did not appear that more than thirty tons were in the possession of the wharfingers. The contract passed the whole of the rosin; though of course, till the rosin was weighed, it was uncertain for what sum the bill of exchange was to be drawn. They submitted, moreover, that in the present case a question might arise, and had indeed been largely discussed in Chancery, on the statute of 1 James 1. Was not this rosin in the visible ownership and disposition of the bankrupt?

GIBBS, C. J.—I consider this case as having already been decided in principle, both in the King's Bench and Common Pleas; and whatever difference

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there may be between those cases and the present, there is no essential distinction. The principle upon which both courts have decided is this, that the order sent by the vendor to the wharfinger to deliver the goods, is sufficient to pass the property to the vendee, provided nothing remains to be done but to make the delivery. If it be necessary by the terms of the contract, or by the order to the wharfinger, that any thing should be done previous to the delivery, the transfer is not complete till *that thing* be done. It is impossible to say, in the present case, that something was not to be done. The order was to weigh and deliver; that act, therefore, which was to precede delivery, not having taken place, the property did not pass to *Bromer*. The statute of *James the First* has no application in the present case. The delivery not being perfected, it is impossible to say that the goods were in the visible ownership, or under the order and controul of the bankrupt.

Verdict for defendant.

Vaughan and *Blossett*, serjeants, for plaintiffs.

The *Solicitor General* and *Taddy*, for defendants.

[Attorneys, *Church*, and *Tomlinson* and Co.]

The right of stoppage *in transitu* has been largely interpreted by recent decisions. It is no longer vigilantly guarded, and jealously admitted, by the Courts of Law, as a merely equitable right; but is justly adopted as within the spirit and principle of the common law. It is a principle of law,

that the sale of goods passes them by force of the contract, and delivery is not necessary to accomplish the title of the vendee against any but the vendor. Whilst the goods remain in the hands of the vendor, he has a lien upon them till he is paid. Our oldest law books, following therein the letter of the civil law, consider the payment of the price, (day not being given) as a condition precedent implied in the contract of sale. *Hob.* 41. But previous to the actual delivery, or what is equivalent, the law avails itself of every circumstance to put the *unpaid* vendor in the repossession of his property, upon the insolvency of the vendee. The vendor, therefore, has a right, for just cause, to retract the intended delivery, and to resume possession of his goods by any means not criminal. The civil law, with respect to the right of lien on goods, extends farther than the law of *England*; by which, as we have above stated, the lien, giving the right of stoppage *in transitu*, is gone, where possession actual or constructive has been taken; but the lien of the civil law prevailed, even against actual possession. *Quod vendidi non aliter fit accipientis quam si aut pretium nobis solutum*

sit, aut satis eo nomine factum, vel etiam fidem habuerimus, emptori sine ulla satisfactione. Dig. lib. 18. tit. 1. l. 19.

There is a difference, however, between this right, and the right to rescind the contract: the former may be exercised by the vendor against the will of the vendee; the latter requires the consent and concurrence of both parties. To assist the equity of this right, the cases turn on very nice distinctions. The first consideration will be, by whom this right may be exercised. 2d, Under what circumstances, after the goods have passed out of the possession of the vendor. 3d, What shall defeat the right.

I.—By whom this right may be exercised.

1st, The vendor, though he purchase the goods of another for commission, may stop them *in transitu*. 3 East, 93. So, the consignor of goods for sale, on the joint account of himself and the consignee, in the event of the insolvency or bankruptcy of the latter. 6 East, 371. But the mere surety for the payment of the price by the vendee, though he may have accepted bills drawn upon him by the consignee for that purpose, cannot. 1 B. and P. 563.

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If goods be sent by order of the consignee, at his account and at his risk, and the consignor draws bills of exchange on him for the price, and indorses and transmits the bills of lading, the consignor cannot take possession of the goods at the place of destination, and insist upon immediate payment as the condition of delivery; the consignee being willing to accept the bills, and not having failed in his circumstances. *Walley v. Montgomery*, 3 East, 585. In the case of the *Constantia*, 6 Rob. 521, after a review of the law upon the subject, both of the general, civil law of Europe, and with reference to the municipal law of particular countries, Sir William Scott, lays it down as the result of the cases, and as an exposition of the principles of the mercantile law, "that persons having accepted orders, and made a consignment, have not a right to vary the consignment, except in the sole case of *insolvency*. The alteration may be made provisionally, without actual insolvency; but if the insolvency do not take place, the act which has been done is a mere nullity, and the seller has exercised a power, to which the law does not ascribe any legal effect."

If a sale be legalized by license, though the vendor be an alien enemy, he may stop *in transitu*. 15 East, 419. So, a principal may stop goods *in transitu* to his factor, though he be in advance, and has accepted bills, and paid part of the freight. 3 T. R. 119. But as a lien once parted with cannot be revived, a factor cannot stop *in transitu*, having parted with the possession. 1 East, 4. 3 East, 100. An actual repossession is not necessary, but a claim and endeavour to get the goods by the vendor is sufficient. 2 B. and P. 462. But the bankruptcy of the consignee is not, of itself, a countermand. 3 B. and P. 471.

II.—Under what circumstances subsequent to the contract, or after the goods have passed out of the possession of the vendor.

1. If the subject of the sale be in a mass with other matter not sold; for example, if it be part of a liquid contained in a vessel; it is conceived no delivery short of the actual separation will defeat the right of the vendor. 13 East, 525. So, if goods in mass, previous to delivery, are to be sorted, numbered, and weighed, the delivery of part from the mass will not divest

the right of stopping the remainder. *Harman v. Meyer*, 6 East, 614. 11 East, 210. Notwithstanding an order to deliver have been given to the wharfingers, and entered in their books. 2 M. and S. 397. So, in all cases where the goods are not in a deliverable state, and further acts are necessary to be done by the seller to make them so. Thus, where A. contracted to sell to B. fifty hogsheads of sugar, called double loaves, at 100s. per cwt. to be delivered free on board a particular ship, and B. sold to C. by the same description, and A. assented to the re-sale, the sugar not having been delivered or re-weighed, it was holden that C. could not recover for it in trover against A., the first vendor. *Austen v. Craven*, 4 Taunt. 464. The case of *Whitehouse v. Frost*, 12 East, 614, may appear, on the first view, inconsistent with some of the propositions stated in this note, and at variance with the last case; but a closer inspection will warrant the principles laid down, and reconcile the cases. In the sale of the oil, in *Whitehouse v. Frost*, it was, from the date of the contract, to be at the purchaser's risk. Next, the specific oil was in existence, contained in a particular place

and vessel named; *Bancroft and Dutton*, the original vendors, had made a complete transfer of the oil to the *Frosts*, the first vendees; they (D. and B.) had received the price, and executed the contract—as between those parties, therefore, no right of stoppage *in transitu* could exist.—When the *Frosts* sold to *Townsend* (whose interests the plaintiffs claimed as assignees) they gave an order on D. and B. to deliver to him: D. and B. indorse their acceptance on this order; and thereby, in the language of the Court, “attorn to the sale, and become bailees to *Townsend*.” Now, although something remained to be done between *Townsend*, and D. and B. who had the custody of the oil, before *Townsend* could be put in separate possession of the part sold; yet, as between *Townsend* and the *Frosts*, nothing remained to perfect the sale; the order of delivery being simply *to deliver*. D. and B., therefore, by the acceptance of the order having admitted that they held the oil as the property of *Townsend*, he had a right to take it without the interference of the *Frosts*. In a word, the question was between different parties.

So, in *Shopley v. Davis*

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and another, 5 Taunt. 617, where ten ton of hemp out of thirty were sold, the order was to weigh and deliver. In that case the Court said, "If any thing remain to be done between vendor and vendee, it is no delivery."

So, in a bargain and sale of ten tons out of a merchant's stock, consisting of several large quantities of oil, in divers cisterns, in divers places, it was holden that trover would not lie for it, because there was no separation of the part sold from the rest of the stock; because the contract did not attach upon any particular parcel of oil; nor had there been any actual delivery. In this last case, *Heath J.* said, "we do not pretend to reconcile *Austen v. Craven* (which was the case relied upon in argument) with *Whitehouse v. Frost*." *White v. Wilks*, 5 Taunt. 177. It is trusted that the attempt made in this note to reconcile the cases, upon an investigation of the principles, may be of use to the reader.

2. A right of stoppage may be exercised though bills be given in payment, unless expressly accepted as such. 7 T. R. 64. *Sed quære*, if before the right of stoppage *in transitu* in this case be exercised, there should not be probable grounds for

believing that the bills will turn out of no value. Can it be done capriciously? 3. Possession obtained by the consignee before the vessel has completed her voyage will not divest the right of stoppage *in transitu*. 1 Esp. N. P. 242. 4. Nor is this right divested by a foreign attachment at the suit of a creditor of the vendee. 1 Camp. 282. And a usage for land carriers to retain goods as a security for a general balance of accounts due from the consignee, will not divest this right of the consignor, upon paying the carriage of the particular goods only. 3 B. and P. 42. 5. Goods deposited at the king's warehouses, on their arrival, for the duties, under 26 G. 3. c. 59. may be stopped *in transitu*, though they have been claimed by the consignee. 2 Esp. 603. 6. So, whilst they remain in possession of the carrier, whether by water or land; also, whilst they are in any place of deposit, until they arrive at the actual or constructive possession of the consignee. 3 T. R. 466. 7. So, the master of a ship chartered wholly by the consignee, is a carrier in whose hands they may be stopped. 3 East, 381.

III.—*What shall defeat this right.*

In the undermentioned cases, the actual or virtual delivery being complete, and the contract executed, the right of stoppage *in transitu* is divested.

1. Where goods are delivered to a packer appointed by the vendee, to forward to any port the latter may appoint, and are opened and examined by the vendee's agent. 3 B. and P. 320. 5 East, 175. 2. Where a ship has been hired by the consignee for a term of years, fitted out, victualled, and manned by him, his property put on board, and sent on a mercantile adventure, delivery of goods on board is equivalent to a delivery into his warehouse, and the right of stoppage is gone. *Fowler v. M'Taggart*, cited 7 T. R. 442. 3. So, delivery to a warehouseman, to whom the vendee pays warehouse rent, though they have not reached their ultimate destination. 3 B. and P. 127. 14 East, 308. 4. So, if the vendor receive of the vendee warehouse rent for the goods remaining in the warehouse, beyond the period at which they ought to have been removed. 1 Camp. 452. 5. So, where with the privity

of the vendor, the wharfinger in whose custody the goods are, charges the vendee with warehouse rent. 2 Camp. 243.

6. So, if the vendee receive from the vendor an order of delivery which he lodges with the wharfinger, though no transfer be made in the wharfinger's books, *ibid.* provided nothing more is to be done but to *make* the delivery; otherwise, if the goods are to be *weighed*, &c. *vide supra*.

7. So, the change of mark from A. to B. on bales of goods in a warehouse, by the direction of the parties, was held by the House of Lords, in a modern case, to operate as an actual delivery. *Per Lord Ellenborough*, 14 East, 313.

8. In the same manner, when timber, to be paid for by a bill at a future day, is marked by an agent of the vendee, whilst lying at the wharf of the vendor, with his concurrence and assent, and a part delivery is made, which is sent off to the vendee's order, the right of stoppage is gone, both as to that part delivered, though it should not have reached its ultimate destination, and as to the residue. *Ibid.* In this case it is to be observed that two things concurred to divest the right of the vendor; a *part* de-

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livery, and a mark put upon the timber with the *consent* of the vendor. 9. So, the marking of goods by purchasers at the time of the contract was held to take the case out of the statute of fraud, and to be a delivery and taking possession by the vendees. 1 Camp. 235. But *quære* if this alone would defeat the right of stoppage *in transitu*? 10. So, a part delivery under a bill of lading to a sub-vendee, upon the arrival of the ship, was held to be equivalent to a full delivery. 2 H. B. 504. 1 N. R. 69. Compare this case with *Hanson v. Meyer*, cited *supra*. 6 East, 614. The distinction seems to be, that in the former case part was delivered in the name of the whole, and nothing remained to be done pre-

vious to the delivery of the remainder, but the mere act of delivery; whilst in *Hanson v. Meyer*, though part of the starch was delivered, the undelivered residue was yet to be weighed. 11. So, if the assignee of the vendee put his mark upon the goods whilst they are at an inn, in their way to the vendee. 3 T. R. 464. *Semble*, such inn must be their ultimate stage.

How far the assignment of a bill of lading, by the consignee to a third person, defeats or limits the right of the consignor to stop *in transitu*, vide *Lickbarrow v. Mason*, 2 T. R. 63. 6 East, 20. 36. n. *Newson v. Thornton*, 6 East, 17. *Cumming v. Brown*, 9 East, 506, and the cases there cited.

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LEWIS v. SMITH, Esq. Treasurer of the West India Dock Company.

June 26.

TROVER.—*Woodbridge & Co.* had imported thirty bags of coffee, and warehoused them in the West India Docks; they sold part of it to *Cummings & Co.* whilst it was lying in the Docks; and *Cummings & Co.* entered into a contract to sell it to the plaintiff. *Lewis* had paid *Cummings & Co.* for the coffee, and the present action was brought to recover the value from the Company, who detained the coffee under an indemnity from *Woodbridge & Co.* who being unpaid had stopped it *in transitu*.

A letter from the plaintiff's attorney to the secretary of the West India Dock Company, claiming the delivery of some coffee, in the possession of the Company, at their Docks, adding, "that he was instructed to take legal measures, if it were not delivered forthwith," is not a notice of action within the meaning of the 39 G. 3. c. 69. s. 185.; the Act which incorporates the Company. *Quære*, if the notice of action should not be to the treasurer of the Company?

By the 39 G. 3. c. 69. s. 185, the Act of Parliament which incorporates the West India Dock Company, it is enacted, that no action shall be brought against the Company, without giving fourteen days' notice, in writing, of such action; and the only question in this case was, whether such notice had been given.

To shew a compliance with the requisites of the Act, the plaintiff's counsel put in a letter, written by his attorney, and directed to the secretary of the West India Dock Company. In this letter, the attorney, in the name of the plaintiff, stated his title to the coffee in question, and made a regular demand of it; adding, "that he was instructed to take legal measures if it was not delivered forth-

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with." To this letter an answer was sent by Messrs. *Kaye & Co.* who acted as attornies for the Company, stating, that they required to see the necessary documents which constituted the plaintiff's title, before they could advise their clients to give up the coffee. About three weeks after the receipt of this letter, the writ was sued out.

The *Solicitor General, Lens and Best*, serjeants, for the defendant, objected, that the letter sent by the attorney of the plaintiff was no notice within the Act of Parliament. The Act directs that all proceedings shall be against the treasurer for the time being, and the plaintiff has elected to sue the treasurer in the present action. But a letter to the secretary is no notice to the treasurer; granting that the letter itself was the proper and formal notice required by the Act, which they contended it was not.

Vaughan and Pell, serjeants, for the plaintiff.—The clause does not direct to whom notice shall be given. It may be given to any servant of the Company. But the answer shews that they have committed the business to their solicitor, which is a waiver of all objections to the notice. If it reach the Company, and their solicitor answer it, it is sufficient. The same formal notice which is required by the 24 G. 2., when bringing an action against a magistrate, cannot be necessary in the present case. The letter gives the requisite information. You have coffee belonging to the plaintiff in your possession; if you refuse to deliver it up to him, he will commence legal proceedings against you.

GIBBS, C. J.—This is an objection in form, but I am bound to take notice of it. The Act of Parliament directs that all actions shall be brought against the treasurer of the Company. I do not consider this letter as a proper notice of action within the meaning of the Act. It is rather a communication of courtesy. It leaves it open to conjecture what legal proceedings were in contemplation of the plaintiff, and against whom they were to be brought. The answer shews that it is a communication of this kind. The solicitors for the Company do not say, we will appear. They answer, let us inspect the documents, and we will then determine whether we shall advise the Company to deliver up the coffee or not. This is not a notice of action, but a mere communication.

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Plaintiff nonsuited.

Vaughan, and *Pell*, serjeants, and *Comyn*, for plaintiff.

Solicitor General, *Lens* and *Best*, serjeants, for defendant.

[Attornies, *Noy* and *H.* and *Keye* and *Co.*]

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HUCKS and Others v. THORNTON.


A vessel with liberty to chase and capture prizes, has some Spanish prisoners on board. By means, which did not appear, they break loose, rise upon, and imprison the crew, with the exception of one sailor, who is heard upon the deck in conversation with them. The captain and crew, with the exception of this sailor, are put on shore, and the Spaniards run away with the ship. Upon a loss alleged to be by barratry of the mariners, this is evidence to be left to the Jury that such barratry was committed.

Where a vessel, engaged in the Southern whale and seal fishery,

and with liberty to chase and capture prizes, is insured in *August*, 1807, with a retrospect to the 1st of *August*, 1806, although at the time of her insurance she was not competent to pursue all the purposes of her voyage, her crew being reduced by death and casualties; if she had a competent force to pursue any part of her adventure, and could be safely navigated home, she is to be deemed sea-worthy.

ACTION on a policy of insurance on the ship *Vigilant*, dated *August* 19th, 1807; to commence on the 1st of *August*, 1806; lost or not lost; with or without letters of marque; with liberty to chase, capture, and man prizes; and to see and take them into port, &c. The loss was alleged to be by the barratry of the mariners, &c. The ship left *England* in 1805; she was licensed to sail without convoy; her burthen was 199 tons, with 10 guns, and 24 men. In *July*, 1806, she had been reported safe. During her voyage she had made several prizes, and a short time before the loss, which was the subject of the present action, she had taken a Spanish vessel. Her original adventure was the whale fishery, and she had taken one whale of 36 gallons; but she had latterly desisted from this part of her adventure, and was principally employed in the seal fishery. In the autumn of 1806, she had on board some Spanish prisoners. By some means, which did not appear in evidence, they were let loose; they rose upon the crew, murdered the mate, and confined the Captain and sailors, with the exception of one man, whose name was *Brookson*, in the steerage. The sailor, who was left at liberty,

appeared to be acting in confederacy with the mutineers. The captain and crew, with the exception of this man, were put on shore on the Spanish main, and marched up to Quito; and the mutineers ran away with the ship. At the time of the capture, the crew was reduced to nine men and a boy. It was in evidence that the crew had suffered by death and desertion since leaving *England*, and that at the time to which the insurance referred, they did not exceed nine men and a boy, though five prisoners were on board. It appeared that the prisoners had been properly confined, though occasionally suffered to come out for air and exercise. It was in evidence that, with a crew so reduced, it was impossible to pursue the whale fishery, and keep a proper guard over the prisoners; but that the crew was sufficient for the seal fishery and other purposes of the voyage, and likewise to navigate the vessel to *England*.

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The *Solicitor General*, *Best*, serjeant, and *Spankie*, for the defendant, made two objections.

1. No barratry. The Spanish prisoners rose upon the crew and ran away with the ship. The plaintiffs may allege any species of loss; they might have alleged simply that she was taken by the Spanish prisoners. They have chosen to ascribe the loss to barratry. If the crew assisted the prisoners in seizing the ship, or were passive and permitted them to take her, that would be barratry: but the present case afforded no evidence of that sort. Did it follow that *Brookson* was a

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mutineer, because not made a prisoner with the rest of the crew. The insurgents might want an English sailor to navigate the vessel. Nothing is more common than for prisoners or mutineers, who rise upon a crew, to spare the captain or some skilful sailor to navigate the ship. He might be obliged to submit to a compulsive force; all the evidence of barratry against him was, that he was heard upon deck talking to the Spanish prisoners, and that he was not confined with the rest of the crew. Supposing *Brookson* on his trial, is this evidence to convict him?

2. The plaintiffs are bound to shew that the *Vigilant* was seaworthy on the 1st of *August* 1806. This was not an insurance from place, but the plaintiffs undertake that, upon the 1st of *August* 1806, she had a proper and sufficient crew on board. No matter what her force was when she sailed from *England*; she still continued to claim the same privileges, to chase, capture, and man prizes, and to pursue the whale and seal fishery. She was taken, moreover, upon whaling ground. As respects the insurers, the 1st of *August* was the inception of her voyage. For a ship of this burthen, of ten guns, so employed, with prisoners on board, could nine men and one boy be a sufficient crew?

Lens, serjeant, for the plaintiffs, admitted that she must be seaworthy on the 1st of *August* 1806; but allowing that, for the beneficial purposes of her voyage, the whale fishery, she had not a sufficient crew; nevertheless, if the crew were suffi-

cient for the other purposes, if she could be safely navigated, and such prisoners as she had on board properly guarded, she might be pronounced seaworthy. The underwriters have all they want, the fair security of the ship. She went out at first manned for both purposes; she might abandon that part of her adventure which required greater force than she possessed, and pursue that branch only for which she was competent.

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GIBBS, C. J.—Undoubtedly this policy had a retrospect to the 1st of *August* 1806. Whether there be barratry or not proved is a question for the jury. There is pregnant evidence that *Brookson* was concerned with the prisoners; but the most important question is, was this vessel seaworthy in *August* 1806? The state of things when this insurance was effected must have been known to the underwriters; they knew that it was an adventure, the circumstances of which must fluctuate from time to time, and that the duty of the plaintiffs would necessarily change with them. When they commenced the adventure the vessel might chase, capture, and man prizes; she might at that time prosecute all or any part of her adventure; she had then a sufficient and disposable force for every purpose: but when, by casualties or other circumstances, the crew was reduced, it would have been a breach of duty in the captain to have prosecuted that part of her adventure which required greater force than the vessel possessed: but other objects might still be within her compass. If she had a competent crew to pursue *any* part of her adventure, it being at her election to pursue what part

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she chose, she might be deemed seaworthy within this policy. The force, in the contemplation of all parties, must fluctuate from time to time. If the crew could perform some of the objects of their adventure with safety, and navigate the vessel home, she cannot be called unseaworthy. It does not appear that she was engaged in any adventure, for which her force was unequal; or that, at the time of her capture, she was employed in the whale fishery.

His Lordship left two questions to the jury.—
 1. Barratry or not, according to the evidence;
 2. Seaworthiness.—The jury found for the plaintiffs on both points.

Lens and Vaughan, serjeants, and *Marryat*, for plaintiffs.

Solicitor General, Best, serjeant, and *Spankie*, for defendants.

[Attornies, *Rivington*, and *Kearsey* and S.].

The foreign writers on insurance hold that barratry comprehends every fault, either of the master and mariners, by which a loss is occasioned. They make no distinction between fraud and negligence, but refer to barratry any loss arising from the unskilfulness or mere imprudence of those who have the charge of the

vessel. Pothier, h. t. n. 65. With us, no act is deemed barratry, merely because it is against the interest of the owners; it must be done with a criminal intent. 7 T. R. 505. *Earl v. Rowcroft*, 8 East, 126. A loss by barratry is well alleged, though the proof is, that it happened by the act of the enemy and barratry jointly.

Toulmin v. Anderson, 1 Taunt. 227. In this case the loss was occasioned by some of the mariners confederating with the Spanish prisoners on board the vessel, and running her on shore. The declaration alleged, that certain of the mariners barratrously took the ship from the master and run her aground, &c.

It was once doubtful whether barratry could be committed by the seamen, without

the participation, and against the will of the captain. 2 Str. 1264. But it is now the practice in all policies of insurance, to include the barratry of the mariners as well as that of the captain; and the underwriters are responsible in either case.

A capture made by collusion with the captain may be described as a loss by barratry, or by capture. 2 Camp. 620.

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HARMAN v. GANDOLPH and Others.

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ASSUMPSIT for demurrage and freight; some of the counts were special, in which the plaintiff averred that he was ready and willing, on a certain day stated in the declaration, to deliver the goods in question. There were likewise common counts for freight and demurrage. The defendants had pleaded the general issue, and a tender of *1l. 4s. 3d.* which was the amount of the freight and primeage.

A general ship took some silk on board to carry from Rotterdam to London on defendant's account. On the margin of the bill of lading was written: "The consignee to clear the goods in 14 running days, after her arrival in port,

or to pay *4l. per diem* for demurrage." The vessel was ready to deliver on the 3d of October. Defendant applied for, and was ready to receive his goods within the running days; but being undermost in the vessel, delivery could not be made till the 22d. Held that the plaintiff was entitled to recover demurrage, though he did not deliver the goods within the time allowed, being prevented by other goods, belonging to other consignees, which overlaid them.


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The defendants were the consignees of two bales of silk, which had been put on board the plaintiff's vessel to be conveyed from *Rotterdam* to *London*. The bill of lading was in the usual terms ; but a memorandum was written in the margin, " that the consignee was to clear the goods out of the vessel in fourteen running days after her arrival in port, or to pay four pounds *per diem* for demurrage." The vessel arrived in the port of *London*, on the 1st of *October* 1814, and was reported at the Custom House on the 3d. The defendants' broker applied for the goods successively on the 8th, 19th, and 22d. The ship began discharging immediately upon her arrival. On the 14th, five bales of silk were ready to deliver ; and two more, the only remaining bales on board, were ready to deliver on the 22d. The running days expired on the 17th. The defendant's goods had been regularly entered at the Custom House, and the warrant for delivery sent down on the 11th of *October* ; but the order for delivery was not brought till the 22d, between three and four o'clock, when the mate was on shore, the ship having finished working for that day. The 23d of *October* was Sunday, and on the 24th the silks were finally delivered to the defendants.

It was in evidence, that if all the consignees had been ready to receive their goods they might have been delivered within seven days from the arrival of the vessel. The present action was brought to recover 28*l.* being the amount of seven days' demurrage, from the 17th to the 24th of *October*.

Best, serjeant, and *Campbell*, for the Plaintiff, relied upon *Leer v. Yates*, 3 Taunt. 387.—They said this point had already been decided. It was too much the practice for the consignees of goods to convert these general ships into warehouses. To prevent this injury they guard themselves by a penalty. They hold the same language to all the consignees—You must clear the vessel within fourteen running days or pay a certain sum for demurrage: though the silks are at the bottom of the vessel, you must, notwithstanding, clear them out; some goods must necessarily be at the bottom, and if one consignee be delayed by the negligence of another, and thereby prevented from getting his goods, and obliged, on account of such delay, to pay demurrage to the owners of the vessel, he must seek his remedy against the person by whose default he has been impeded. In the present case, the order to deliver was not given till the 22d.

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The *Solicitor General* and *Bosanquet*, serjeant, for the defendants.—The order for delivery is never sent till the goods are ready to deliver. The consignees have done every thing in their power; they demanded the goods on the 8th, again on the 19th, and it did not appear that the plaintiff was ready to deliver till the 22d. The case of *Leer v. Yates* might be rightly decided; but there was a strong feeling against it in the mercantile world. It is true, if a merchant covenant to freight a whole ship, and unload her in a certain time, he covenants against all accidents; and whether the ship be delayed by his own default, or by circumstances

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which he cannot controul, he is responsible for his breach of covenant. But it is otherwise with a general ship, where he is one of many consignees; and the hardship is extreme in the present case, where the defendants are owners of two bales of silk, the whole freight of which amounts only to 1*l.* 4*s.* 3*d.*, and the demurrage claimed is 28*l.* In the declaration, moreover, it is averred that the plaintiff was ready to deliver, &c. The evidence is against this allegation.

GIBBS, C. J.—The consignee, by taking to the goods, contracts with the owners of the vessel to perform the terms upon which they have undertaken to convey and deliver them. Those terms are expressed in the bill of lading; and the defendants, by claiming and receiving the silks, have acceded to them. The captain was ready to deliver his cargo on the 3*d* of *October*. If all the consignees had been ready, he might have cleared the vessel within seven days. It appears, however, that she was not cleared till the 24*th*. The consignees of such goods which are at the bottom of the vessel cannot receive them till the latter period of delivery. Each consignee undertakes to clear away his goods within a certain time; and although by the default of others he is prevented from so doing, he is liable notwithstanding to demurrage by the terms of the contract, unless the delay be occasioned by the default of the captain or his crew. Though the defendants were ready to receive the silk sooner, it could not be delivered sooner, because other consignees had neglected to take away their part of the cargo. The plaintiff must

proceed regularly ; he cannot consult the convenience of one consignee in preference of another. The principle of this case is already decided in *Leer v. Yates* ; but it will be for the jury to say, whether or not the plaintiff be entitled to recover for the two days, from the 22d to the 24th, independent of any question of law ; for it appears that, upon the forenoon of that day, the silks were ready to be delivered, and it was the fault of the defendants that they were not delivered on the 22d. But, in point of law, I think the plaintiff is entitled to recover though he did not deliver the goods, being prevented by other goods, belonging to other consignees, which overlaid them. With respect to the objection to the declaration, the plaintiff may recover upon the common counts for demurrage.

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The counsel for the defendants pressed his Lordship to direct the jury to find a special verdict ; but he declined so doing, and recommended a bill of exceptions, if they were desirous to have the point upon the record, which was accordingly tendered.

The jury found for the plaintiff demurrage for the whole seven days. Verdict for defendants on the tender.

Best, serjeant, and *Campbell*, for plaintiff.

The *Solicitor General*, and *Bosanquet*, serjeant, for defendants.

[Attornies, *Lowless* and Co., and *Crowder* and Co.]

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The decision in *Leer v. Yates* seems to stand upon legal, and, properly understood, upon equitable principles. The hardship is incidental, and one of those rigours to which law, from the necessary generality of its provisions, is by its nature subject. The consignee, it is said, is ready to receive the goods in the proper time; he applies for them, and by the neglect of others, for whose conduct he did not stipulate, he cannot obtain them. The running days expire, and he is called upon to pay a heavy charge for demurrage. It is added, that this delay, so common, and indeed almost necessary in the port of *London*, must have been in contemplation of the ship-owner, and, therefore, that the sufferance of it is an implied condition of his contract; that this inconvenience, and of course the implied condition, applies still more forcibly to a general ship; it is a misfortune pressing equally on both parties, the freighters and the owner. There is no ground for the presumption of a default in the consignee. Why should he be made responsible where he has no controul? Still less, why should he be made responsible for the default of all other consignees in

the general lading? If an injury, why should not the owner partition it amongst the several parties according to their respective interests? Why, indeed, is the owner entitled to any compensation? Each party performs his duty in the contract. The consignee claims within the proper time, and the owner delivers the goods as soon as he is able. In order to entitle himself to compensation for demurrage, he must claim under an express or implied condition, or by some positive default on the part of the consignees. With respect to default, none is pretended; and with regard to the contract, it is *nudum pactum*. The words which are supposed to create the obligation are the words of the captain, the servant of the owner, who signs the bill of lading, and delivers it to the shipper. The defendant does not sign it; but it is said, that by accepting this bill of lading, and claiming the goods under it, he accedes to the terms; and that therefore this action may be sustained on the general count for demurrage. It cannot be disputed that the acceptance of the bill of lading binds the consignee to pay the freight, and any demurrage occasioned by wilfulness or neglect; but can it bind him to

any terms which the owner chooses to insert? At all events these terms are subject to an equitable construction, and cannot in any way be extended to what is manifestly unreasonable,—that of rendering one consignee responsible for the default of another, for whom he does not stipulate, and over whom he has no controul. Again, before the owner can call upon the consignee to answer in damages for a nonfeasance, of what he morally could not do, he, the owner, must shew that he was ready to deliver; that the goods were in a situation to be capable of delivery at the time. This at least is a concurrent, if not a condition precedent.


The answer to this argument seems to be in substance: 1st. That between the owner of the vessel and the consignee of the goods there is no necessity for an express contract. Though there be no original privity of contract between the parties, yet the taking of the goods from the ship under the bill of lading is evidence of an agreement, in *ipso tempore*, to pay the freight, &c., according to the terms of the bill of lading. That the bill of lading indeed is not signed by the consignee,

but it is delivered to the shipper abroad, and by him presumed to be transmitted in due mercantile course to the consignee at home; by taking to the goods, he accedes to the terms of the bills of lading under which he takes them, and concludes the contract by executing it. *Dobbin v. Thornton*, 6 Esp. 16. *Cock v. Taylor*, 13 East, 399.

2. In ordinary cases, where demurrage is claimed, the question is twofold. Did the delay arise from the default of the freighter? Was it the act, or *delictum*, of the owner himself? But there is a middle case, that in which neither is in default; and in which the question is, which party is bound by the incidents of chance, or of any cause not within his own controul. In this case (which is the present) as the loss must be sustained by one party, the inquiry is, who is to bear it? And here we must have recourse to general principles; a person who hires any chattel, whether it be a horse, a house, or a ship, may be said to detain it, if at the end of the stipulated time he does not return it to the owner. He is responsible for all incidental circumstances which may prevent him from

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so doing. In the present case it is totally an indifferent circumstance that the ship is a general ship; all and every one, each singly for himself, is bound to clear within the stipulated time. If any one do not clear his goods, no matter from what cause (the ship being there with them) he detains the vessel, and renders it impracticable for the owner to make use of her for other purposes. Any one, therefore, in this default, is liable for the detention of the vessel. Thus, in *Randall v. Lynch*, 2 Camp. 352. it was determined by Lord *Ellenborough*, that if by reason of the crowded state of the London Docks, a ship is detained there before she can be unloaded a longer time than is allowed for that purpose by the charter-party, the freighter is liable for this detention to the owner of the ship.

The cause of detention therefore is immaterial, if the owner be not in fault. If it be incidental, it is an incident belonging to the consignee; it is his mischief, his loss, his misfortune. It is so much longer time beyond the contract taken from the owner; and being the casualty, if not the act of the consignee, he must pay for it. Though there may be no mutuality or privity between the consignees, yet, in regard to the owner, the delay or impediment of one is effectually the same as the delay or impediment of all.

In respect to mercantile contracts, however, whatever may be the hardship in any particular case, the mischief will not be extensive; as contracts will gradually assume a form suitable to all possible contingencies.

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BARTON v. GLOVER.

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ASSUMPSIT.—Plaintiff and defendant were coach proprietors, at *Croydon*. On the 2d of *April*, 1815, they entered into an agreement, the substance of which was, that in consideration that *Barton* would pay to the defendant the sum of 175*l.*; 50*l.* to be paid in money, and the residue in bills of a month from the date of the agreement, the defendant would withdraw his stage coach from the road, and not engage or concern himself in driving any other stage coach on the road from *Croydon* to *London*. The following was the clause in the agreement on which the question arose:—

Where a person binds himself in an agreement to pay a certain sum of money in case of a breach of the terms of it on his part, and it is therein stated "that the sum mentioned is to be considered as liquidated damages," *Semble* that in an action upon the agreement, the Jury are bound to give the plaintiff the whole money; and that such sum is not to be considered as a penalty, but as damages ascertained between the parties.

" And for the due and punctual performance of this agreement, each of the said parties to these presents does hereby agree to bind himself to the other of them in the sum of 500*l.* to be considered and taken as liquidated damages, or sum of money forfeited or due from the one party to the other, who shall neglect or refuse to perform his part of the agreement.

" JOHN GLOVER.

" RICHARD BARTON.

" *April* 2, 1815."

Best, serjeant, in addressing the Jury for the plaintiff, insisted that he had a right to a verdict for the whole penalty, in case he should shew a breach of the agreement. *Fletcher v. Dyche*, 2 T. R. 32.

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The *Solicitor General*, *contra*.—The 500*l.* is merely intended as a penalty. It is not because the parties use the term liquidated damages that, for every breach of the agreement however slight, the whole penalty can be exacted. Penalties can seldom be enforced conscientiously; courts of law lean against them, and courts of equity relieve against them. He cited *Astley v. Weldon*, 2 B. and P. 346.

GIBBS, C. J.—There are a great many cases in which stipulated damages are contracted for, but in which neither courts of law nor equity will permit the parties to recover them. Neither of the cases cited comes up to the present. In *Astley v. Weldon*, there was no stipulation that the damages should be liquidated; and in that case there were several minor fines, which repudiated the idea that the whole penalty should be due for every breach. But in the present case, unless the damages are to be considered as liquidated, and definitively ascertained by the parties themselves, the clause in the agreement means nothing.

His Lordship said, he would reserve the point; but the cause was afterwards referred.

Best and Copley, serjeants, and *Puller*, for plaintiff.

Solicitor General, and *Lens*, serjeant, for defendant.

[Attornies, *Holt* and *F. and Allen*.]

In *Smith v. Dickenson*, 3 B. and P. 630, the Court of Common Pleas expressed themselves clearly of opinion, that the word "penalty," used in the agreement, effectually prevented them from considering the sum mentioned as liquidated damages.

In actions brought for the breach of covenants and agreements, there has sometimes been a difficulty in distinguishing between penalties and liquidated damages. The fair result of the cases seems to be this—

1. Where a sum of money, whether in the name of a *penalty* or otherwise, is introduced in a covenant or agreement, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed or contract, and the penalty only as accessory, and therefore only to secure the damage really incurred. This rule has long been established in courts of equity, and the statute 8 and 9 Wm. 3. has introduced this practice, and affords the same benefits to defendants at common law; for it is no longer now matter of election in the plaintiff to proceed under this statute: the provisions

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are compulsory, and must be pursued.

2. Where a deed contains covenants, or an agreement contains provisions, for the performance of several things, and then a large sum is stated at the end, to be paid upon the breach of performance, that must be considered as a penalty.

3. Where the payment of a smaller sum is secured by a larger.

4. Where the word penalty is specifically used it is merely as a security.

5. A court of equity will relieve against a penalty, upon a compensation; and a court of law will not enforce it beyond the actual damage sustained; but where there is a covenant in a deed to pay a particular liquidated sum, neither a court of equity nor a court of law can make a new covenant for a man; nor is there any room for compensation or relief; as in leases, containing covenants for ploughing up a meadow. If the covenant be "not to plough," and there be a penalty, a court of equity will relieve against the penalty, and direct an issue of *quantum damnificatus*. And in an action of covenant at common law, a breach must be assigned, and the extent of

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the injury will be the measure of damages which the plaintiff will recover. But if it be worded to pay 5*l.* an acre for every acre ploughed up; there is no alternative; no room for any relief against it; no compensation; it is the substance of the agreement.

6. Where the precise sum, therefore, is not of the essence of the agreement, the *quantum* of damages may be assessed by a Jury; but where the precise sum has been fixed and agreed upon by the parties, that very sum is the ascertained and liquidated damage; the Jury are confined to it, and the plaintiff cannot recover beyond it. For example, where a stipulated sum has been claimed for breach of a marriage contract; in which case it might not be possible to ascertain precisely what damages the person, in respect to whom the contract is broken, has sustained; and therefore the contracting parties agree to pay a stipulated sum: in such case, the sum stipulated is, by the convention of the parties, the *real* debt, and becomes due, *in integro*, on a breach of the contract.

7. But in all articles guarded by *penalties*, there are two remedies to be pursued at the option of the party injured:

he may, as often as the articles are broken, have, *toties quoties*, an equitable relief, upon the footing of the articles themselves, for a partial breach of contract, or he may take the penalty. That is to say, where there is a penalty and covenant in the same deed, the party has his election either to bring debt for the penalty, or an action on the covenant for damages. In the former case, the contract is rescinded, and the penalty becomes the debt in law; subject of course to relief in equity, and to the restrictions by the mode of proceeding under the 8 and 9 Wm. 3*d.*, in a court of law; and if the penalty be paid, according to the stipulation of the articles, or be recovered as the debt in law, the party cannot resort back to his covenant or action for the breach of the contract. But he may elect to bring his action on the contract, and, according to the nature of the case, may recover even *beyond* the amount of the penalty in damages.

Ponsonby v. Adam, 6 Br. Parl. Cas. 418. *Harrison v. Wright*, 13 East, 343. *Rolfe v. Peterson*, 6 Br. Parl. Cas. 470. *Sloman v. Walter*, 1 Brown. Cas. in Chanc. 418. *Hardy v. Martin*, *ibid.* 419.

<i>Lowe v. Peers</i> , 4 Burr. 2229.	<i>v. Dyche</i> , 2 T. R. 32.	<i>Astley</i>	1815.
<i>Cotterel v. Hook</i> , Doug. 101.	<i>v. Weldon</i> , 2 B. and P. 346.		
<i>Bird v. Randall</i> , 1 Black.	<i>Smith v. Dickenson</i> , 3 B. and	BARTON	
Rep. 387, and 373. <i>Winter</i>	P. 630. <i>Wilbeam v. Ashton</i> ,	v.	
<i>v. Trimmer</i> , <i>ib.</i> 395. <i>Fletcher</i>	1 Camp. 78.	GLOVER.	

DE MEDINA v. POLSON.

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THIS was an action for use and occupation.— The plaintiff claimed a quarter's rent. The defendant entered into a verbal agreement with an agent of the plaintiff for the occupation of a house in *Burton-street* at the rent of 70*l.* per annum. The agreement was made on Friday, 7th of October, 1814, to take the house for three years; possession to be given on the following Monday, but the defendant was not to pay rent, or commence tenant, until certain alterations were made, which had been pointed out by the defendant, and agreed to by the plaintiff. On Saturday the defendant ordered some coals to be sent into the house before Tuesday. On the Monday the defendant gave notice to the plaintiff that he retracted the agreement. The coal-merchant, by mistake, delivered the coals on Monday. On the Tuesday, the defendant sent for them, and they were re-delivered to him.

Though an agreement for use and occupation is void by the statute of frauds, nevertheless, if the tenant take possession of the premises under it, he becomes a tenant at will, and recourse may be had to the original agreement to calculate the amount of rent.

For the defendant, it was contended, that this agreement, not being in writing, was void by the

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statute of frauds. It was not a lease in possession, but in reversion, and therefore not within the exception in the statute.

The *Solicitor General*, for the plaintiff.—Admitting the lease to be void, it would have the effect of a tenancy at will; the defendant has taken possession by sending in the coals, and the plaintiff is entitled to a quarter's rent.

Lens, contra. The action of use and occupation can only be founded upon the relation of landlord and tenant. Can it be insisted that the actual taking possession of the premises is sufficient, though the taking be void by the statute of frauds? The law annuls all contracts like the present; you cannot claim any portion of rent, because you cannot receive evidence of any ingredient of a contract which the law has declared to be void. The putting in the coals is no possession; it might be a trespass, or the subject of another action; but it will not support an action for use and occupation.

GIBBS, C. J.—The agreement is void by the statute of frauds; but I am of opinion that you may still resort to it to calculate the amount of rent. In case the tenant under such an agreement should take possession, he would be a tenant at will, and might determine his tenancy at whatever time he pleased. The coals appear to have been sent in by mistake; the occupation, therefore, does not seem to have commenced. I shall direct the Jury, if they think with me upon the

coals, to find a verdict for the defendant, and shall give the plaintiff liberty to move upon the point of law which I have ruled against him.

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Verdict for the defendant.

Solicitor General, and *Abbott*, for the plaintiff.

Lens, serjeant, and *Gifford*, for the defendant.

[Attornies, *Alliston* and Co. and *Law*.]

GERNON and Another v. The Corporation of the
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June 30.

ACTION on a policy of insurance, on sugar, by the *Mary*, from *Liverpool* to *Calais*. The plaintiffs claimed a total loss by perils of the sea. Defence, that it was a partial loss, and 885*l.* paid into court.

If a ship by bad weather be compelled to put back to her loading port, and upon examination of her cargo, it is found not to be in a fit state to send forward to its original destination, and altogether unsuited to the market from sea-damage, the insured is entitled to abandon. Afterwards held by the Court, that he was entitled to a reasonable

The policy was dated 21st *November*, 1814. The vessel took in her cargo on the 1st of *December*, and sailed from *Liverpool* on the 2d; she encountered very severe weather, struck on a bank, and was compelled to return to *Liverpool* on the 20th of *December*. The agents for the ship at *Liverpool* gave immediate notice to the plaintiffs in *London*. The cargo was taken out, and several

time for examining the state of the cargo before he made his election to abandon.

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examinations made. By letter of 24th of *December* they wrote to the plaintiffs, that the damage was not so great as was at first expected. On the 29th, after another examination, they stated that some of the boxes of sugar were damaged, but that the rest of the cargo might be re-shipped. A few days afterwards a final examination took place ; and the opinion on the survey was, that the sugars were all more or less damaged, and that it would be advisable to sell them for the benefit of the underwriters. The plaintiffs, on the 2d of *January*, had communicated to the underwriters the state of the cargo according to the information which they then had. The underwriters observed that they never gave any directions upon the sale of damaged goods ; but required the damage to be made out in the usual manner. The report of the final survey on the 7th of *January* was received by the plaintiffs on the 9th ; on the same day they handed over the report to the underwriters, and gave a formal notice of abandonment.

With respect to the condition of the cargo, some of the boxes were half washed out, and others empty ; no part of the cargo was in a merchantable state, and could not have been sent abroad but as damaged goods. The value of the sugars, if sound, would have been 9,200*l.* ; the plaintiffs were only interested in a moiety ; deducting the expenses of the sale, the sugars netted 6,047*l.* 5*s.* 5*d.*

The *Solicitor General*, *Best* and *Bosanquet*, serjeants, for defendants.

1. This is not a case of total loss ; it is not like

the case of goods being put into a foreign port, where there is no agent of the party. The ship returns to her loading port with her cargo damaged to the extent of not quite one-third. The owners under such circumstances cannot turn it into a total loss. They say the voyage was lost because they would not send the goods to a foreign market in a deteriorated state; but there is no case, when the goods have been returned into the port where they were laden with a loss upon them of less than a third, in which it has been holden to be a total loss. The abandonment will not make a total loss unless there be one.

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2. Election to abandon must be made immediately; the plaintiffs have not done so; they knew of their loss on the 24th and 29th of *December*, and it is to be inferred from their conduct that they meant to treat it as an average loss; but they do not give notice of abandonment till the 9th of *January*. Meantime the cargo was deteriorating from day to day.

Lens, Vaughan, serjeants, and *Scarlett*, for the plaintiffs.—It is impossible to do justice to this as an average loss. It is still a point, when the body of a ship is saved, whether it can be a total loss. There are some new cases on this point: but as to the cargo it is another question; here there is an entire loss of the whole concern, the market is lost, the voyage is defeated, the whole speculation at an end; besides, where is the injustice of claiming a total loss, when the defendants have benefit of

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salvage. They relied on the words of Mr. Justice *Buller* in *Mitchell v. Eddie*, 1 T. R. 608. "Where the voyage is lost, but the property is saved, the owners have an option to abandon; but unless they do elect to abandon, it is only an average loss." They contended, that the abandonment was in time; the owners only wanted to ascertain the real state of the sugars. It is true, they might have elected to abandon earlier; but it would then have been said that they abandoned prematurely. This is not a case in which they have been remiss; they did not hesitate when the real state of the sugars was known; the sugars being a perishable commodity, it was necessary to examine them with reference to the state of the markets for which they were intended; they only paused till the fullest inquiry could be made.

GIBBS, C. J.—As the sugars were in existence, it could only be a total loss provided the assured abandon in proper time; but they are not justified in abandoning, unless the property be in such a state that it cannot be applied to the original purposes of the voyage. Was it in such a state as to be sent to its original destination? It is in evidence that no part was in a merchantable state. Ought it then in reason to have been sent? If not in a proper condition for the market, I am of opinion that the plaintiffs were entitled to abandon, provided such abandonment were in time.

His Lordship left it to the jury to say, whether the property was in a fit state to be sent forward

on the voyage ; and with respect to the notice of abandonment, whether it was in proper time or not, his Lordship reserved the question for the Court.

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The jury thought the sugars not fit to be sent forward ; and they found, under the direction of his Lordship, that the abandonment was in time, subject to the question of law. Verdict for a total loss.

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Lens and *Vaughan*, serjeants, and *Scarlett*, for the plaintiffs.

The Solicitor General, *Best* and *Bosanquet*, serjeants, for the defendants.

[Attornies, Messrs. *Dances* and Co. and *Kaye* and Co.]

In the ensuing term, the *Solicitor General* obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered.

Lens and *Vaughan*, serjeants, shewed cause.

The Court were of opinion, that, as the jury found the goods were not in a condition to be forwarded, there was no ground for saying that the insured were not entitled to abandon, or that the abandonment was made too late. Rule discharged. 2 Marshall's Reports, 92.

See likewise *Allwood* v.

Henkell, Park on Insurance, 172. *Anderson* v. *Royal Exchange Assurance*, 7 East, 38.

In case of an insurance upon goods, what shall be deemed a total loss, so as to entitle the assured to abandon, has been a subject of much discussion, and is not as yet reduced to any certainty. It is true, every case must depend upon the circumstances ; but no case has yet defined, with the due precision, what the general state of circumstances must be. If the voyage be lost, from whatever cause, it is said to be a total loss. *Manning* v. *Newn-*

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ham, 2 Marsh. 585. But the rule in that case is much restricted by the decision of K. B. in *Anderson v. Wallis*, 2 Maule and Selwyn, 241. That was a policy on goods at and from *London* to *Quebec*, warranted free of particular average. The ship, owing to sea damage in the course of her voyage, was obliged to run into port, and undergo repair, and some part of the goods were damaged, and the repairs detained her so long as to prevent her reaching *Quebec* that season, and no other ship could be procured at that, or a neighbouring port, to forward the cargo in time, so that the voyage was abandoned, and the ship afterwards sailed on another voyage. The court held that this was not a total loss of the goods, and the assured could not abandon. In this case Lord *Ellenborough* says, "I am well aware that an insurance upon a cargo for a particular voyage, contemplates that the voyage shall be performed with that cargo, and any risk which renders the cargo permanently lost to the assured may be a cause of abandonment. In like manner a total loss of a cargo may be effected, not merely by the destruction of that cargo, but by a total permanent incapacity

of the ship to perform the voyage: that is a destruction of the contemplated adventure. But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing the burthen on the underwriters. There is not any case or principle which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of the abandonment."

Where the ship was wrecked, but the goods brought on shore, though in a very damaged state, so that they became unprofitable to the assured, it was holden that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by notice of abandonment. *Thompson v. R. Exch. Ass. C.* 16 East, 214. This decision, however, turned upon the clause in the policy which excepted the underwriters from particular average. The effect of which was to make them liable if the goods were wholly lost, but not if they were only damaged.

But the underwriters were held liable to a total loss upon a cargo of corn, where the

ship, from the perils insured against, became incapable of pursuing the voyage, and another vessel could not be procured to forward the corn to its destination. *Wilson v. R. E. Ass. C. 2 Camp. 623.* The difference between this case and *Anderson v. Wallis* is, that in the former case the voyage was wholly lost, and the cargo, a perishable commodity, was deteriorating daily; whilst in *Anderson v. Wallis*, the voyage was only suspended or retarded, and the cargo, which was copper, could not be injured by delay.

In *M'Ivor v. Henderson*, which was determined in K. B. in Hilary term last, 1816, the Court, in the judgment delivered in that case, have thrown new lights upon this very entangled but important subject of abandonment.

The case was this:—A ship, insured from *Liverpool* to *Sicerra Leone*, was captured in the course of her voyage by a French frigate, plundered of her stores, and of most of her guns and ammunition. She was then delivered by the captors into the possession (by way of gift) of the master of a Portuguese vessel, which had been previously captured by the privateer. The Portuguese took the vessel, with the British

captain and part of the crew on board, to *Fayall*. He there laid claim to her in the Vice Admiralty Court, which claim the British captain opposed; the Court however decreed in his favour, and ordered the vessel to be restored to him. The Portuguese appealed, and the British captain was obliged to deposit 427*l.* to abide the event of the appeal. In the mean time, he communicated what had happened to the plaintiff, who gave notice of abandonment to the defendant, which notice the defendant refused to accept. The vessel afterwards, and before the commencement of the action, arrived at *Liverpool*. The question was, whether the plaintiff was entitled under these circumstances to recover as for a total, or for an average loss. It was holden by the Court, that he was entitled to recover for a total loss: that he had a right to abandon when the news of the capture arrived; and nothing had occurred since to defeat that right.

Lord *Ellenborough*, in delivering the judgment of the Court, observed, It is contended that a contract of insurance is a contract of indemnity; and that, therefore, the actual damage sustained in the result can only be recovered

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by the assured. And the cases of "*Godsall v. Boldero*," 9 East, 72. "*Hamilton v. Mendes*," 2 Burr. 1210, and "*Bainbridge v. Neilson*," 10 East, 329, and others, have been cited. But this case is obviously different from them all. Here there never was any restitution of the ship in the state in which it was insured. Here the guns and stores were never restored; the voyage was completely lost; and the ship itself was never fully liberated and restored, by reason of the actual deposit of the sum of 427*l.* to abide the event of the appeal. The sentence of appeal is to determine the right of possession; but is the plaintiff to wait for that decision, accompanied as it must be with damages, perhaps to a much larger amount than the interest which he has in the ship? Under these circumstances, what can be said to be the limits of the plaintiff's loss? If it be an average loss, who shall determine what the average is? Can it be safely said, that this is not a total loss? And what is to be the extent of the average loss under the circumstances of this case? Does the mere restitution of the hull of the vessel remove the idea of a total loss, if the plaintiff be compelled to pay

more for that restitution than the ship is worth? Is the loss, under that circumstance, reducible only to an average loss? If no abandonment had been already made, we should have no hesitation in saying that there are sufficient circumstances to justify the abandonment at this moment. An abandonment would be well warranted at this instant. The voyage is lost; the cargo is lost; the stores are gone: and is the assured to pursue the hull with all the trouble, expence, and hazard of litigation in a foreign Court of Admiralty? Can it be said that the effect of the abandonment as for a total loss, by reason of capture and detention, is to be frustrated by the continuance of a loss of a similar kind? It appears to us, that there existed at the time of the abandonment a clear right to abandon; that the action was well brought for a total loss, and that there exists, at the *present* moment, circumstances fully sufficient to entitle the plaintiff to recover.

See likewise *Dyson v. Rowcroft*, 3 B. and P. 474. *Ritchie v. Falkner*, 2 M. and S. 290. *Everth v. Smith*, *ibid.* 278. and for other leading cases on the subject of abandonment, vide *Goss v. Withers*, 2 Burr. 683.

Hamilton v. Mendes, 1 Black Rep. 276. *Mitchell v. Eddie*, 1 T. R. 608.

In *Smith v. Robertson*, which was a case of appeal to the House of Lords, 2 Dow. Rep. 474, the Chancellor (Lord Eldon) appeared far from satisfied with some of the latter decisions, particularly *Bainbridge v. Neilson*, and *Ritchie v. Falkner*. The case of *Smith v. Robertson* was this—Insurance on the *Ruby*, at and from *Halifax* to *Plymouth*—captured on the voyage—intelligence of the capture—and immediate abandonment; and some steps taken by the underwriters to settle the loss. Intelligence *then* of the vessel being re-captured, and refusal of the underwriters to settle, except for a partial loss. Held by the Scotch Admiralty Court,

and Court of Sessions, that, upon notice of the abandonment given, and intelligence of the capture, the transaction was closed, and not subject to be disturbed, upon any event appearing from subsequent intelligence. The judgment was affirmed in the House of Lords on the ground of the acceptance of the abandonment by the underwriters. By these means steering clear of the principles upon which K. B. had decided, *Bainbridge v. Neilson*, and *Ritchie v. Falkner*.

Lord Eldon in this case expressed an opinion, that it was a question, notwithstanding all the boasted certainty of the Law of Insurance, whether there was not as much uncertainty in this law as in any other.

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Wood and Others v. ZIMMER and Others.

A patent is void. 1st. If the specification omit any ingredient, which, though not necessary to the composition of the thing, for which the patent is claimed, is a more expeditious and beneficial mode of producing the manufacture; and, 2d. If previous to the patent being granted, the article has been publicly vended (though only four months) by the patentee himself.

THIS was an issue out of Chancery directed to try whether a patent, bearing date 20th of *January* 1812, was or was not a valid patent on the 5th of *February*, 1813. The plaintiffs were assignees of *Vanuriet, Zinck*, and Co. and the patent in question had been sold by the bankrupts, before their bankruptcy, to the defendants.

The patent had been granted for a new mode of making verdigrease, to be called British Imperial Verdigrease. The specification stated it to be produced from certain proportions of granulated copper and oil of vitriol boiled a certain time in a copper of a particular construction (which was described) and afterwards strained off and mixed with a solution of potash or soda.

The verdigrease so produced was of a brighter green, and superior to the French verdigrease. A chemist gave evidence to the utility and novelty of the invention; and a workman employed by the patentees proved that, by following the directions in the specification, the manufacture might be produced: he added, that he had manufactured it himself. It appeared, however, that *Zinck* was accustomed clandestinely, and unobserved by his workmen, to put *aqua fortis* into the boiler, by means of which the copper was dissolved more rapidly. It appeared, likewise, that four months

previous to the patent, the bankrupts had sold an article, composed precisely in the same manner as that for which the patent had been obtained, under the name of Dutch Imperial Green.

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The *Solicitor General* and *Selwyn*, for the defendants, made two objections: 1. The specification omits the *aqua fortis*, which was a material ingredient, and always employed by the bankrupts in manufacturing the verdigrease. 2. The verdigrease, under another name, had been publicly vended by the bankrupts previous to their obtaining this patent.

Best, serjeant, for the plaintiffs. 1. The specification is sufficient to make the verdigrease: the *aqua fortis* was no necessary ingredient. It did not improve the colour, or save expence. It merely produced a more rapid solution of the copper. 2. Though *Zinck* sold the article before, that is to say, in *August*, 1811, and the patent was not obtained till *January*, 1812, he did not thereby forfeit his privilege in the invention. He might still obtain a patent; the discovery is still new; the invention is still his; and the secret locked in his own breast. Though sold, in a few instances, the property was not rendered common whilst he kept the secret. The secret was not disclosed till the patent was obtained.

GIBBS, C. J.—The objections to this patent are—First, The omission of *aqua fortis* in the specification. Secondly, That the article was not a

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new one at the time of the patent; inasmuch as the bankrupts sold it previously. They gave it to the world without a patent, and they cannot afterwards obtain a patent. It is said that this patent makes verdigrease, and is therefore sufficient. The law is not so. A man who applies for a patent, and possesses a mode of carrying on that invention in the most beneficial manner, must disclose the means of producing it in equal perfection, and with as little expence and labour as it costs the inventor himself. The price that he pays for his patent is, that he will enable the public, at the expiration of his privilege, to make it in the same way, and with the same advantages. If any thing which gives an advantageous operation to the thing invented be concealed, the specification is void. Now, though the specification should enable a person to make verdigrease substantially as good without *aqua fortis* as with it; still, inasmuch as it would be made with more labour by the omission of *aqua fortis*, it is a prejudicial concealment, and a breach of the terms which the patentee makes with the public. With respect to the second objection, the question is somewhat new. Some things are obvious as soon as they are made public. Of others, the scientific world may possess itself by analysis. Some inventions almost baffle discovery. But to entitle a man to a patent, the invention must be new to the world. The public sale of that, which is afterwards made the subject of a patent, though sold by the inventor only, makes the patent void. It is in evidence that a great quantity was sold in the

course of four months before the patent was obtained ; and that the bankrupts were in the habit of selling this manufacture.

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His Lordship left two questions to the Jury :—
1. Whether *aqua fortis* was used by the inventor as an ingredient in the verdigrease. 2. Whether the invention was in public sale before the patent. In either case his Lordship thought the patent void.

The Jury found both questions in the affirmative.—Verdict for the defendant.

Best, serjeants, and *Scarlett*, for plaintiffs.

The *Solicitor General*, and *Selwyn*, for defendant.

[Attornies, *Lovel—Oakley*.]

The subject of patents for new inventions has not been treated with due precision, as a branch of law by itself, in any of our law books. It is only indeed within a few years that they have become so important a part of our commercial machinery, and like a new and peculiar property, have assumed the qualities belonging to their specific nature. In *Boulton and Watt v. Bull*, 2 H. Black, 463 ; and in *Horn-*

blower and Maberly v. Boulton and Watt, 8 T. R. 95, the importance of the case and circumstances first drew the peculiar attention of the Courts of King's Bench and Common Pleas ; and the law of patent rights for new inventions (as far as those cases go, which are in fact but one case,) may be found in the arguments and judgment of the Courts. According to the ancient doctrine of the law, patents for

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new inventions, like other royal grants, were regarded as proceeding *ex speciali gratia*, and *mero motu* of the crown. Being likewise in their nature a restriction upon general trade, they were little favoured by our best lawyers, but considered as grants of the crown, in some degree at the expence of the subject. They were, therefore, according to the equity of all grants of the sovereign, interpreted with the greatest strictness, and the law gave as little as was consistent with the faith of the royal word. But in the improvement of manufactures, and in the more guarded exercise of the prerogative, patents have assumed a more beneficial form and character. They are thus a kind of *copyright* of trade. The property and exclusion are given to the inventor, for the public benefit; to reward him and encourage others. This is the present legal acceptance of patents for new inventions. It may be useful to give a brief view of the law upon this subject. Our plan necessarily confines us to principles, as collected from, and supported by, authorities.

Patentees for new inventions are left by the stat. 21 Jac. 1. c. 3., to the common law, and the remedies which

follow the nature of their rights: but to render their patents valid, all the conditions required by the above statute must be observed. That statute condemns all monopolies; but the 5th and 6th sections save letters patent, and grants of privileges of the sole working and making of any *new manufacture* within this realm, to the first and true inventor, so that they be not contrary to the law, or mischievous to the state. The word *manufacture* is of most extensive meaning, and applies not only to things made, but to the *practice* of making; to principles carried into practice in a new manner; and to new results of principles carried into practice.

The questions which generally arise upon patents are—1st. Whether the *subject*, for which the monopoly is claimed, were a known invention, and in use before the patent. 2nd. Whether the specification be sufficient to enable others to make it up, in a mode as beneficial as that which is made use of by the inventor himself. The meaning of the specification is, that others may be taught to do the thing for which the patent is granted; and that, after the term, the public shall have the benefit of the discovery.

If the specification, therefore, be false, or there be any concealment, either in the principles and composition, or the mode of operation, the patentee is guilty of a fraud upon the public rights; his specification is false, and his patent void. Therefore, in a patent for trusses for ruptures, the patentee omitted what was very material for tempering steel, which was rubbing it with tallow, and for want of that Lord *Mansfield* (Bull. N. P. 76.) held the patent void.

In the *King v. Arkwright*, which was a *scire facias* to repeal a patent, *Buller J.* lays down these rules:—1. A man, to entitle himself to a patent, must disclose his secret, and specify his invention, in such a way, that others of the same trade, who are artists, may be taught to do the thing for which the patent is granted, by following the directions of the specification, without any new invention or addition of their own.—2. He must so describe it, that the public may, after the expiration of the term, have the use of the invention in as cheap and as beneficial a way as the patentee himself uses it; and, therefore, if the specification describe many parts of an instrument, or machine, and the patentee

himself uses only a few of them, or does not state how they are to be put together, or used, the patent is void.—3. If the specification be in any part of it materially false and defective, the patent is against law, and cannot be supported. Bull. N. P. 77.

When it appears that the patentee has made a full and fair discovery, he is entitled to the protection which the law gives him. But where the discovery is not fully made, the law will prevent any imposition on the public, and vindicate its rights. Slight grounds will be sufficient to vacate the patent, as in the case of the patent for steel trusses, already cited. The patentee, therefore, should give a specification of the invention in the clearest and most unequivocal terms of which the subject is capable; and if it appear that there be any unnecessary ambiguity, affectedly introduced into the specification, or any thing which tends to mislead the public, in that case the patent is void. So, if the patentee say, that by one process he can produce three things, and he fails in one. *Turner v. Winter*, 1 T. R. 602. So, if the specification direct the same thing to be produced several ways, or by

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several different ingredients, and any one of them fail. *ibid.*

As to the invention, the rule of law is very different from what it is in the specification; for with regard to the specification, if any one part of the invention be not sufficiently described, the whole patent is void; but, as respects the invention, if any one part of it be new and useful, that is sufficient to sustain a patent for the particular object of the invention. But the patent must not be more extensive than the invention. Therefore, if an invention consist in an addition or an improvement only, and the patent is for the whole machine or manufacture, it is void. *The King v. Else*, Bull. N. P. 76.

In *Morris v. Brandon*, the question was, whether an addition to an old stocking-frame was the subject of a patent. Lord *Mansfield* said, if the general question of law, viz. that there can be no patent for an addition, be with the defendant, that objection would go to repeal almost every patent that was ever granted. There was a verdict for the plaintiff, which was acquiesced in. Bull. N. P. 77. "Since that time it has been the general received opinion in Westminster Hall, that a patent for

an addition is good, but then it must be for the addition only, and not for the whole machine." Per Buller, J. in *Boulton v. Bull*, 2 Henry Black. 489.

In the last case, which was in the Comm. Pl. that court was equally divided, whether a patent for a *new invented method* of using an old engine in a more beneficial manner than heretofore, by the employment of certain principles, was valid or not. Afterwards another action was brought upon the same patent, and a general verdict having been found for the plaintiffs, and judgment given for them by the Court of Common Pleas, the defendants brought a writ of error in K. B. It may be necessary to state the case more fully, as it is the leading case upon the subject.

It was a patent to A. for his method of lessening the consumption of steam and fuel in fire-engines: the specification stated, that the method consisted of the following principles "[describing the mode in which these principles were applied to the purposes of the invention]" afterwards an Act of Parliament was passed to extend the patentees' term, the title of which was, An Act for vesting the sole property, &c.

"of certain steam engines, called fire engines, of his invention," &c.; and after reciting that the patent was "for making and vending certain engines by him invented for lessening the consumption of steam and fuel in fire engines," &c.; it granted him the sole right of making and selling the said engines."

The defendants contended, 1st. that it was a patent for a *principle* and not a *new manufacture*, and that nothing could be the object of a patent but a *new manufacture*. 2d. That if it were a patent for a *manufacture*, namely, the steam engine, it was not new; and that the patent should have been for the addition only, and not the whole engine. The Court of K. B. were of opinion that this invention was the subject of a patent: that it was not a patent for principles only, but for principles embodied in an engine or machine, to produce the effect described, viz. that of lessening the consumption of steam and fuel in fire engines; and that it was not a patent for an old engine, but for an addition to, or an improvement of, the old engine. The judgment of C. P. was affirmed.

From these two cases, *Boulton v. Bull*, 2 Hen. Black. 489.

and *Hornblower v. Boulton*, 8 T. R. 95. may be deduced almost all of the learning and law on the subject of patents for new inventions.

The word used in the statute of *James* is *manufacture*: we have already observed upon the extent of its meaning. Under this class we may comprehend, in the first place, new compositions of things, such as *manufactures* properly so called. 2d. All mechanical inventions, whether made to produce old or new effects; for a new piece of mechanism is a thing made. 3d. Under the *practice of making*, which is another and perhaps the primary meaning of the word *manufacture*, we may class all new artificial manners of operating by the hand, or with instruments in common use; new processes in any art, producing effects useful to the public. When the effect produced is some new substance or composition of things, the patent ought to be for such new substance or composition, without regard to the mechanism or process by which it is produced. When the effect produced is no new substance, the patent can only be for the mechanism, if new mechanism be used, or for the process, if it be a new method of operat-

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ing, with or without old machinery, by which the effect is produced.

"*New methods of manufacturing articles in common use may be said to be new manufactures, in one of the common acceptations of the words. Three-fourths of the patents granted since the statute are for methods of operating, and of manufacturing, producing no new substance, and employing no new machinery.*" Per Eyre, Ch. J. in *Boulton v. Watt*.

It is clear, however, that there cannot be a patent for a *philosophical* principle only, but, for a principle so far embodied and connected with corporeal substances, as to be in a condition to act, and to produce effects, in any art, trade, mystery, or manual occupation, there may be a patent. Per Eyre, C. J. *ibid.* So a patent for a machine improved by a *philosophical* principle, though the machine existed before, is good. *Ibid.* Mechanical and chemical discoveries are subjects for *patents* as well as manufactures properly so called; and that although the materials be old, if the arrangement or compound be new. But then the patent

must be restricted to the arrangement or compound: and in all cases the new and the old should be accurately distinguished. So a foreign article is considered as a new manufacture, upon its first introduction here, although it may have been old abroad. *Jessop's case*, cited in *Boulton v. Watt*.

The publisher of the discovery is entitled to a patent for it, whether he happen to be the original inventor or not. It is he who confers the benefit upon society; not the man who hoards it up in his own breast; for where one person had discovered a new method of making refracting telescopes, but, never having made it public, another had obtained a patent for it, the patent was deemed valid. This was *Dolland's case*, as stated by *Bulter J.* in *Boulton v. Watt*.—Mere incidents commonly known need not be stated in a specification.

In an action for infringing his patent, a patentee must give some evidence (slight evidence will be sufficient) of the novelty of his invention, and that it can be produced by the mode described in his specification.

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MAY and Others v. CHRISTIE.

July 1.

ACTION upon a policy of insurance on goods on board the *Jonge Anthony*, from *London* to *Amsterdam* or *Rotterdam*; the policy was effected at fifteen guineas *per cent.*, two to be returned on arrival. The vessel had been seized by the Dutch Government; but upon the plaintiff's agent entering into a bond to the *Attorney General* of the Dutch Government, that in case the goods should be confiscated the bond should be in force, she was liberated. In *July* 1810 the ship and cargo were condemned; and the plaintiffs were called upon to satisfy their bond, which they accordingly did. After the arrival of the vessel, and before the condemnation, the plaintiff's broker applied to the defendant for the return premium of five guineas, which he immediately paid; his initials were put to the policy in the usual way, to signify that it was adjusted, and then struck out. The bond was mentioned to him before he settled; he said, he was glad that the vessel had arrived, as he heard some ships had been seized. The cargo sold for more than its estimated value, and the plaintiffs claimed an average loss.

Where the assured claims and receives the return premium due upon the arrival of the vessel, and the policy is adjusted upon that footing, he cannot, without an express stipulation, resort again to the underwriter in any contingency of the adventure.

Lens, serjeant, for defendant.—The plaintiffs have claimed and received a return of premium with a knowledge of all the circumstances. If they had a private reservation or contingent right, they ought to have communicated it. But claiming

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upon the foundation of arrival, without any further explanation to the defendant, it is a tacit admission that they have no other claim. If they intended to claim upon the contingency of a loss, the broker should have taken the premium without prejudice. He could not receive the premium on arrival, but on the express footing of arrival. They never intimate they have any other demand. It is therefore a determination of the adventure.

The Solicitor General, contra.

GIBBS, C. J.—The return of five *per cent.* on arrival means, that if the adventure be safely terminated, and the underwriter free from all danger of loss, and discharged from all other claims, he will return to the assured a portion of the premium which he has received. The plaintiffs have no right to call on the underwriters unless the risk be at an end; whilst they are subject to any danger they cannot be called upon to return the premium. The return premium is only due when the adventure is wound up. If any thing of risk, as respected that bond, remained outstanding, it should have been communicated to the defendant when the return premium was claimed. It should then have been demanded as matter of favour, and not of right; because it is not due of right until the risk is closed. If the plaintiffs intended to reserve a contingent claim upon the underwriters after they received the return of premium, they should have stipulated for it.

His Lordship left it to the jury, whether the

whole adventure was to be considered as closed by the acceptance of the return of premium, or whether it was received with a reservation that the underwriters should still be liable if the bond were put in force.

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The jury, which was a special jury, found for the defendant.

The *Solicitor General*, *Best*, serjeant, and *Galee*, for plaintiffs.

Lens and *Vaughan*, serjeants, and *Taddy*, for defendant.

[Attornies, *J. and J. Gregson*, and *Kaye* and Co.]

PEARCE and Others v. COWIE.

July 1.

THIS was an action on a policy of insurance on a Portuguese vessel owned by a British subject, at and from *Amelia* island to *Liverpool*. The vessel took in her cargo at *Amelia* island. With the exception of some tierces of rice on board it consisted of cotton. The ship, on account of bad weather, was obliged to put back to *Amelia* island.

The words "all sorts of wool," in the 43 G. 3. c. 155. s. 13., do not include cotton wool; especially when the words wool and cotton wool, are used in another clause, and in the same section of the act, as distinct commodities. Therefore, the importation of cotton from *Amelia* island, in a Portuguese vessel, owned by a British subject, the captain and crew of which are Portuguese, is contrary to the Navigation Act. The 55th G. 3. c. 8. is not an exposition of the 43d.

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where she was found to have sustained so much damage that it became necessary to sell her. The plaintiffs claimed a total loss.

Best, serjeant, and *Richardson*, for defendant.—The voyage is illegal by the Navigation Act. A ship of this description, the master and crew of which are foreigners, cannot bring any such commodities from a Spanish settlement in *South America*. The plaintiffs will rely on the 43 G. 3. c. 153. s. 13.; but that act only authorizes them to import into *Great Britain* all sorts of wool. The act proceeds to give a liberty to import into *Ireland* “all sorts of barilla, &c., and wool and cotton wool.” There is therefore an obvious distinction made by the Legislature; the bulk of this ship’s cargo was cotton wool, and not the wool which the act permits to be imported into *Great Britain*. Wool, standing alone, means wool from the back of the sheep, and not cotton wool.

The *Solicitor General*, for plaintiffs.—The Act says “all sorts of wool,” which includes cotton wool. The word wool, in respect to *Ireland*, is not used in the same meaning as in respect to *England*. The term wool, it is contended, applies to the animal: that may be, as regards *Ireland*; but “all sorts of wool,” includes both animal wool, as well as cotton wool. The 55 G. 3. c. 8. continues the act of the 43d, and is an exposition of it. It makes it lawful to import into *Great Britain* all sorts of wool, and cotton wool. Its intent is to continue the privileges of the 43d, and not to give new privileges. It cannot be said

to be a *continuing* act, if it gives new powers. The 55th recites the 43d, and shews, that in the former act cotton wool was virtually included in the term wool. It is therefore an explanation of the 43d.

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GIBBS, C. J.—Cotton wool is not included in the term wool in the act of the 43d of the King. Wool is produced from the animal; cotton wool grows from the ground: when applied to wool, it means unmanufactured wool. An irresistible argument is furnished by the two branches of the act as respects *Ireland* and *England*. Why should cotton wool be specifically mentioned in the clause to import into *Ireland*? It would have been included in "all sorts of wool." The legislature evidently meant to distinguish. The 55th, I think, clearly shews that cotton wool was not comprehended in the words "all sorts of wool" used in the 43d.

Plaintiffs nonsuited.

The *Solicitor General*, *Lens*, serjeant, and *Scarlet*, for the plaintiffs.

Best, serjeant, and *Richardson* for the defendant.

[Attornies, *Windle*, and *Crowder* and Co.]

The illegality in the present case arose out of the system of the navigation laws; a system to be referred generally to the celebrated act of C. 2. c. 12.; and though some traces

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are to be found in the earlier periods of our history, yet that act is usually considered as the basis of the system as it now

stands. Vide *Wilson v. Marryatt*, 8 T. R. 81. *Same v. Same*, 1 B. & P. 432.

July 6th.

MARSH v. PEDDER and Others.

In an action of covenant upon a charter-party for freight, it is no defence that the plaintiff received part of the freight in money from the defendants' agent abroad, and the residue in a bill (without the privity of the defendants) drawn by the agent upon, and accepted by, certain merchants at London; and which bill was afterwards dishonoured upon the insolvency of the drawer and acceptors. But the defendants are still bound to pay the freight owing to the plaintiff; and such bill is not to be deemed payment, though defendants were not informed of the transaction until after the failure of the parties to it.

COVENANT on a Charter-party.—The plaintiff was the owner, and the defendants freighters of the *Rover*; the voyage was from *London* to *Antwerp*, and the freight and primage 410*l.* The declaration averred a delivery of the goods at *Antwerp*, and alleged a breach in the non-payment of the freight. There were several pleas: the substance of them was—That one *Joseph Osey*, to whom the captain, (who was the plaintiff,) was directed to apply at *Antwerp* for the freight, &c. paid plaintiff 15*l.* 13*s.* 6*d.* part of the 410*l.*; and, for the residue, gave his bill of exchange, drawn on *Baker, Mant, and Page*, in *London*, payable at sixty days' date to plaintiff's order, for 258*l.* 6*s.* 6*d.*; which bill was duly accepted; and that plaintiff received the 15*l.* 13*s.* 6*d.*, and the said bill of exchange, in full payment and satisfaction. The plaintiff replied to these pleas, that he did not take the bill in satisfaction, but as a security only, and that, by reason of the insolvency of *Osey*, the drawer, and *Baker and Co.*, the acceptors, he was un-

payment, though defendants were not informed of the transaction until after the failure of the parties to it.

able to procure payment of it. It appeared, that defendants had given the plaintiff a letter to *Osey*, at *Antwerp*, directing him to pay for the entire freight 410*l.* and to give them the earliest intelligence of the vessel's arrival. The plaintiff had been before chartered by the defendants; had been addressed to *Osey*, and received payment from him. The defendants likewise sent the following letter to *Osey*:—"Mr. *Joseph Osey*,—According to the manifest, you will receive for our account 459*l.* 9*s.* 11*d.* The balance we shall be obliged by your remitting to us, less your charges."

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On the arrival of the vessel, *Osey* paid in discharge of the freight 151*l.* 13*s.* 6*d.*, and gave a bill of exchange for 258*l.* 6*s.* 6*d.*, the residue of the freight, drawn by his agent, to the order of *Marsh*, upon *Baker*, *Mant*, and *Page*, *London*. This bill was accepted by plaintiff without any stipulation. On the 1st of *May*, *Osey* remitted defendants 72*l.* and claimed a deduction, from some monies of defendants in his hands, of 410*l.* as paid to plaintiff for their use. The bill was regularly accepted by *Baker* and *Co.* in *London*, and became due in the latter end of *June*. In the mean time *Osey*, and *Baker* and *Co.* became insolvent, and the bill not being paid, plaintiff applied to the defendants for the residue of the freight.

The *Solicitor General*, and *Campbell*, for the plaintiff, relied on *Tapley v. Martens*, 8 T. R. 451. and *Everett v. Collins*, 2 Camp. 515.

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Best, serjeant, and Scarlett, for the defendants.

It appears by the charter-party, that the freight was to be paid at *Antwerp*, and not in *London*.

It also appears that there was a sum of money in *Osey's* hands, the balance of which, after payments which he was directed to make, he was to remit to the defendants. The plaintiff takes the bill without communication with the defendants. He thus got a new security upon another person. No captain, who is to receive his freight at *Antwerp*, having taken a bill drawn upon a third person (which is the material distinction) can, on any contingency, resort to the freighters, who authorized him to receive the money for the freight at the port of delivery. If the plaintiff had told *Osey* that he took the bill as security only, that would have reserved his right against the defendants; but if he mention nothing about security, he takes it as payment. *Tapley v. Martens* does not apply. This is no bill of exchange drawn on defendants here. No intimation is given to defendants that the plaintiff had got the bill, till *Osey* failed. Plaintiff must take the consequence upon himself if he will receive a bill drawn on a perfect stranger. If a bill had been given, and not accepted, it would not have done; but, by interposing a third person, a new security is given. If, upon simple contract, a bill of the party had been given and dishonoured, it would have been no payment; but the security of a third person might be pleaded as accord and satisfaction. If a person be the principal in a bond, and the obligee takes a bank-note in discharge of the bond, and

the bank fails, it is payment. Besides, plaintiff might select this mode of payment for his own convenience.

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GIBBS, C. J.—The question is, are the defendants liable at law for the freight. The plaintiff covenants to deliver the goods according to the charter-party; the defendants covenant that they will, by themselves or assigns, pay freight. If the defendants themselves had paid part by bill, and that bill dishonoured, unless there had been proof that the plaintiff took it in full satisfaction, it would not have been payment. It is the same when payment is made through an agent, and part is paid in money, and part by a bill which is dishonoured. The defendants will remain liable to so much of the freight as is not paid. Circumstances may vary this case. If, when money is offered, the plaintiff chooses, for his own accommodation, to take a bill, there would be some weight in the argument. It is not stated that the plaintiff knew that *Osey* was to pay him in cash. It is not to be inferred that *Osey* was so to pay him. The defendants, therefore, are liable for so much of the freight as remains due.

Verdict for plaintiff, 258*l.* 6*s.* 6*d.*

The *Solicitor General*, and *Campbell* for plaintiff.

Best, serjeant, and *Scarlett*, for the defendants.

[Attornies, *Holt* and *F. and Daves* and Co.]

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Tapley v. Martens is materially distinguished from the present case. A. wishing to send goods to B. at X., employed C. to carry and deliver them to B., and engaged to pay C. for the freight; C. on delivering the goods took a bill of exchange from B. drawn on A., which bill was never paid. It was held that A. was liable to pay the amount of the freight to C., notwithstanding the bill of exchange. 8 T. R. 451.

But if the plaintiff had been guilty of any negligence after he had taken the bill, in not endeavouring to enforce payment of it, that might have been an answer to the demand in the principal case. All that could be required of the plaintiff was, that he should use common prudence, and in the above case he did use common prudence. A bill might have deluded the most cautious man; it was a payment in the most

usual mode of payment in the commercial world. Moreover, the defendants by sending the goods to *Osey* at *Antwerp* accredited him there.

In *Everett v. Collins*, Lord *Ellenborough* says, "If a creditor *prefers* a bill of exchange, accepted by a stranger, to ready money from his debtor, he must abide the hazard of the security he takes." In that case, the plaintiff was offered by the agent cash in payment, or a check upon his (the agent's) banker; and he preferred the latter, which being dishonoured, it was held not to discharge the debtor, although the agent failed with a balance of his principal in his hands to a large amount. In that case the agents were considered as servants of the defendant, and *their* check was *his* check. 2 Camp. 515.; and see the cases referred to in the note.

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SITTINGS AFTER MICHAELMAS TERM
AT WESTMINSTER, 56 GEO. III. 1815.

BEROLLES v. RAMSAY.

Dec. 1.

ASSUMPSIT for the price of a chronometer.
Plea—Infancy, replication, necessities.

A lieutenant in the Royal navy, under the age of 21, is not answerable for the price of a chronometer, in an action to which he has pleaded his infancy, and the replication is, *necessaries*.

The plaintiff was a watchmaker, and had sold to the defendant, who was a lieutenant in the Royal Navy, and at the time when the contract was made under the age of twenty-one years, a chronometer, for which he charged 68*l*. The plaintiff's counsel insisted that a chronometer was necessary to a lieutenant in the navy.

Lens, serjeant, for the defendant.—It might be necessary to a lieutenant in commission ; but the defendant being out of commission at the time, it was not necessary.

GIBBS, C. J.—Certain things may be necessary, but not suitable to the condition of the parties. A jury cannot determine a chronometer necessary to this defendant, unless it be necessary for every lieutenant in the navy. He was out of employment at the time it was furnished ; and it was not certain that he would be sent where a chronometer was necessary. It would be most detrimental to the

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service, if it were laid down as a general rule that every lieutenant of the navy might contract for the purchase of a chronometer, and, though under age at the time of the contract, should be responsible for the price. I think it not a necessary.

Verdict for the defendant.

Best, serjeant, and *Ballantine*, for plaintiff.

Lens, serjeant, for defendant.

With respect to the necessities for which an infant may contract, the question always bears a reference to the condition of the parties. Necessaries, in fact, is a wide relation. It is not simply in any absolute thing; it is not in food, clothes, or lodging, but in any article which may correspond with the condition and circumstances of the infant.

It has been justly said, that the defence of infancy is not to be used as a sword but as a shield—the law seeks only to protect the infant from the effects of imprudence.

It has been determined that an infant, a captain in the army, is liable to pay for a livery ordered for his servant, as necessaries, but not for cockades ordered for the soldiers of his company. *Hands v.*

Slaney, 8 T. R. 578. But assumpsit on an account stated does not lie against an infant, even though the particulars of the account were for necessities. *Trueman v. Hurst*, 1 T. R. 40.

So, it was held by *Mansfield*, C. J. that an infant cannot accept a bill of exchange for necessities. *Williamson v. Watts*, 1 Camp. 552. See likewise 1 Carth. 160. Com. Dig. *Enfant*, c. 2. It has been thought, however, that he might bind himself by a promissory note for necessities, by analogy to the ancient doctrine, that a single bill given by an infant for necessities was binding. 1 Rol. 729. l. 20. R. 1 Lev. 36. But there is a material distinction between a single bill and a promissory note; that the former

was not negotiable; whilst promissory notes, since the statute of *Anne*, are upon the same footing as bills of exchange. As a promissory note, therefore, might be indorsed over, it should seem that an infant would not be bound by such security, at least not whilst it is in the hands of an indorsee, and in the hands of the person to whom it was originally made payable, it would probably be deemed to have no other qualities than a promissory note had before the statute of *Anne*, that of being evidence of a debt.

Single bills are scarcely known in the present day; they are obligations by bill or note without a penalty. But an infant can on no account bind himself in a bond with a penalty conditioned to pay interest as well as principal. *Fisher v. Mowbray*, 8 East, 330. It appears, moreover, from the judgment in that case, that an infant can give no security to bind himself for the payment of interest.

Necessaries for an infant's wife are necessaries for him, but not if provided in order for the marriage. *Turner v. Trisby*, Str. 168. Money advanced to release an infant taken in execution may be re-

covered as necessaries. *Clarke v. Leslie*, 5 Esp. 28. *Alvanley*, C. J. 1803. But if the infant were in custody upon mesne process, it must be shewn that the debt, for which the arrest was made, was for necessaries. Regimentals sold to a member of a volunteer corps are necessaries, per *Ellenborough*, C. J. in *Coates v. Wilson*, 5 Esp. 152. The question of necessaries is to be governed by the real circumstances of the infant, and not by his ostensible situation. *Ford v. Fothergill*, Peak, 229. But the Court shall judge what things are necessary, Cro. Eliz. 583. An infant, however, is not liable for money lent, though laid out in the purchase of necessaries. *Robert v. Knouth*, 2 Esp. 472 n. per Buller J. 1783. See likewise 1 Salk. 279. *Com. Dig. Infant*, c. 2. But if one lends money to an infant to pay a debt, and if in consequence of such loan he does not pay the debt, the infant shall be liable in equity; for the lender of the money stands in the place of the person paid, viz. the creditor for necessaries, and shall recover in equity, as the creditor would have recovered at common law. *Marlow v. Piffield*, 1 P. Wms. 559.

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not follow, because the policy is so defective that the plaintiff cannot recover from the underwriters, that he can therefore recover from the defendant; but I think the letter not doubtful. With this letter before him, it was not expecting too much from the defendant that he should effect a policy on goods shipped at *Malaga*. It was understood that the goods were to be shipped at *Malaga*, and the defendant ought not to have effected a policy, which can only attach on goods shipped at *Gibraltar*. I think the vessel having been in the bay of *Gibraltar* is sufficient, without having actually touched at the port.

Verdict for plaintiff.

Solicitor General and Parke, for plaintiff.

Copley, serjeant, and *Gifford*, for the defendant.

[Attornies, *Payne* and *Leachman*, and *Wadson*.]

This case was afterwards moved on the part of the defendant in the next Hilary Term; but the Court concurred in opinion with the Lord Chief Justice at the trial; and the rule nisi, which had been obtained, was discharged. The Court, however, were of opinion, that the broker should have effected the insurance, at and from Gibraltar bay, and

not at and from Gibraltar. 2 Marsh. Rep. 190.

A broker who has neglected to insure the premium according to the directions of his principal, cannot set up as a defence that he was directed also to insure against British capture; for that is not a crime so as to render the whole insurance illegal, though it would be void *pro tanto*.—

Brokers on receiving an order may renounce it altogether; but if they adopt it, they are bound to execute it, as far as by law they may, *secundum formam jubeantis*.—*Glaser v. Cowie*, 1 Maule and Selw. 53. *Lubbock v. Potts*, 7 East, 249.

The case of *Robertson v. French*, 4 East, 130, first decided that a policy on goods laden at one port will not cover goods laden at an anterior port. That has been followed by a series of cases; *Spitta v. Woodman*, 2 Taunt. 416. *Langhorne v. Hardy*, C. P. *Same v. Collaghan*, *Horncyer v. Lushington*, 15 East, 49. and *Mellish v. Allnut*, 2 Maule and Selw. 106. in which the authority of *Spitta v. Woodman* has been recognized by K. B. and C. P.

The Court of K. B. have however expressed an opinion, that the very strict construction which first obtained in *Spitta v. Woodman*, (where it was holden that the words beginning the adventure from the loading on board, were to be confined to the place from whence the risk commenced) was not a construction to be favoured, and still less to be extended. And that if there were any thing in the policy to indicate that a prior loading

was contemplated by the parties, it would release the case from that strict interpretation. Thus, in *Nonnen v. Kettlewell*, 16 East, 177, the plaintiff was held entitled to recover a loss of goods insured at and from *Landscrona* to *Wolgast*; though they were shipped at *Gottenburgh* before the ship arrived at *Landscrona*, and though the policy was declared to be *at and from the loading of the goods on board the ship*; it appearing that the underwriter was informed at the time that the goods were loaded on board at *Gottenburgh*, and that part of them were landed and re-loaded at *Landscrona*, so as to enable the Custom House officers to ascertain the quality of the goods and adjust the duties: the policy being *free of average*.

So, in *Bell v. Hobson*, the principle in *Spitta v. Woodman* was excluded, on the ground that the policy in that case, which was on goods, (beginning the adventure from the loading thereof) was declared to be a continuation of a *former* policy; which was a policy from *Virginia* to the ship's port of discharge in the U. K., or any port in the *Baltic*, with liberty to take in and discharge goods wheresoever.

So, where a policy of insu-

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rance was on goods at and from *P.* to *M.* and from thence to *L.*, beginning the adventure on the goods from the loading thereof, on board the ship *wheresoever*. Held, that it would cover goods previously

loaded at *L.*, and which arrived at *P.*, but were not unloaded there, and afterwards sustained a partial loss in the voyage from *P.* to *M.* *Gladstone v. Helay*. 2 Maule and Selw. 419.

Dec 7.

ORME v. YOUNG.

The neglect of the obligee to give notice to the surety, that the principal had made default, does not discharge such surety; but if the obligee (without the privity of the surety) enter into an engagement with the obligor; and deprive himself of the power of suing him, whereby the surety is prevented from coming into a court of equity for relief, he is then discharged; but not otherwise.

DEBT on bond, dated 25th *November*, 1807, in the penal sum of 44,000*l.*, to secure the payment of 22,000*l.*, payable by instalments of 1,000*l.* half-yearly, from the 29th of *September*, 1807, to the 29th of *September*, 1812, when the residue of the sum secured was to be payable.

The defendant pleaded, First, Non est factum.

2d. That he entered into the bond as surety for one *William Orme*, and that the plaintiff, on the 28th of *September*, 1812, without the privity and consent of the defendant, forbore and gave day of payment of the sum of 13,000*l.* residue of the principal money, then due, to *William Orme*, jun. beyond and after the 29th of *September*, 1812, when the same became payable.

There were other pleas to the same effect.

The case was this: the plaintiff assigned his business to his son upon his giving him a bond executed by himself and ten sureties, one of which was the defendant, to secure to the father the value of the stock and business. The bond was given for 22,000*l.*, payable by instalments of 1,000*l.* half-yearly, until 9,000*l.* should be paid, at which time, the 29th of *September*, 1812, the residue was to be paid. The son paid the instalments regularly, till the 13,000*l.* became due, at which time he made default in paying the principal sum, but continued to pay his father sums of 1,000*l.* each, at different periods, and in five different payments, down to *January*, 1815: in all 5,000*l.* In *March*, 1815, *William Orme*, jun. became a bankrupt. No notice had been given to the sureties of the default of *William Orme* in the payment of 13,000*l.*, and it did not appear that they were privy to the mode in which the payments had been made. The plaintiff had indorsed receipts for them upon the back of the bond, giving credit for them as half-yearly receipts, and not making any distinction between the payments before the 13,000*l.* became due, and those made afterwards. They were all entered as half-yearly payments by the son to the father; but no agreement of forbearance was in evidence.

The *Solicitor General* and *Lens*, serjeant, for the defendant, contended, when the 13,000*l.* became due, it was the plaintiff's duty to have called on *William Orme*, or the sureties. If he chose to give time to his son, he should have acquainted the sureties with it. No communication was made

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to them. The first time they hear of a default is upon the bankruptcy of the son. If the obligee do not claim his debt when due, but agrees to extend the time, and enter into arrangements with his debtor, he discharges the sureties. What was done between the father and son was without the privity of the defendant. The manner of payment, subsequent to the 13,000*l.* becoming due, is evidence of an agreement between the father and son to proceed with the same mode of payment as was stipulated for the 9,000*l.* The sureties ought to have been acquainted with this arrangement. They have lost the opportunity which a court of equity would have given them, of calling upon their principal, when solvent, to pay the obligee.

Vaughan, serjeant, and *Comyn*, contra.

GIBBS, C. J.—The defence upon the record is, that the plaintiff before the 29th *September*, 1812, forbore and gave day of payment to *William Orme*, jun.: in other words, that the obligee has extended the terms of the obligation without the privity of the sureties. This defence is borrowed from a court of equity: there, if day of payment be given to the debtor, the sureties are discharged. It is the equitable right of sureties to come into a court of equity and demand to sue in the name of the creditor. Now, if the creditor have given time to his debtor, the surety cannot sue him; but the fact to be tried is, was time of payment given without the privity of the sureties? What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refrain-

ing; not exacting the money at the time; but it is the act of the creditor, depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a court of equity for relief; because the principal having tied his own hands the surety cannot release them. Here there is no contract to forbear; no impediment to the suit. A neglect to give notice to the surety that the debtor has made default does not discharge him. But the present issue is, was there an agreement to forbear? I am of opinion there was none.

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YOUNG.

Verdict for plaintiff, for 8,508*l*.

Vaughan, serjeant, and *Comyn*, for plaintiff.

Solicitor General, and *Lens*, serjeant, for defendant.

[Attornies, *Druse* and *Ludlow*.]

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Dec. 8.

**HOUSTON and Others, Executors of Houston
v. ROBERTSON.**

A broker is not entitled to set off returns of premium, which became due after the death of an underwriter, in an action brought against him by the executors of such underwriter.


THIS was an action to recover' the amount of some premiums due to the testator in his lifetime. The plaintiffs sued as executors: the facts were these:

The plaintiffs' testator was an underwriter. The only question in this case was, whether, as the testator died before the return premiums became due, the defendant had a right to set them off against the executors. The defendant had paid money into Court, and if he had a right to make this deduction he was entitled to a verdict.

Vaughan, serjeant, and *Taddy*, for the defendant.—It is true the return premiums do not become due till *Houston's* death; but the testator did not claim them in his lifetime; he left the account open. It is an account, therefore, to be taken between the executors and the defendant as it now stands. If the testator had lived to commence the action he would have been subject to these deductions. The reservation of the right of a return premium, in case of a contingency, was the inducement to the defendant to enter into the original contract; it is therefore a part of the contract, and the executors must take the whole together.

The *Solicitor General* and *Gaselee*, contra.

GIBBS, C. J.—Is not this stipulation for the return premium something collateral to the contract. The full amount of the premiums was due to the testator in his lifetime: he had a present right to them. He dies, and a subsequent event raises a claim to a return premium. All the arguments which apply in case of the underwriter's bankruptcy, apply still more forcibly to that of his death. Undoubtedly the defendant may sue his representatives upon that account; but I am of opinion that he cannot avail himself of it by set-off in this action. I will, however, reserve the point.

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Verdict for plaintiff, subject, &c.

Solicitor General and *Gaselee*, for plaintiff.

Vaughan, serjeant, and *Taddy*, for defendant.

[Attornies, *Gregsons*, and *Tomlinsons* and Co.]

In the ensuing term *Vaughan*, serjeant, moved for the defendant upon the point reserved; but the Court refused a rule to show cause.

The Chief Justice observed: that it was impossible to distinguish this case from *Minett v. Forrester*, and the cases which had been subsequently decided upon the same principle: that as the broker could not, in any sense, be said to be an agent for the underwriter after his bankruptcy, neither could he

be so after his death: that as the right to the premium was communicated to the assignees by the underwriter's bankruptcy, in the same manner the right was transferred to the executors by his death; and that the authority ceased in either case.

A good deal of complexity has been introduced in cases of this description, by not adverting to the ordinary course of the broker's dealing, and

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the character in which he stands related to the underwriter on one hand, and to the assured on the other. It is the well known, indeed the invariable custom, for the underwriters when they subscribe a policy of insurance, to write against their respective subscriptions an acknowledgment of the premium having been then received. It is never in fact paid at the time, but is entered by the broker (*minus* his commission of 5 per cent. thereon) to the credit of the underwriter, in an account between them; and, in like manner, it is entered by the underwriter in his books to the debit of the broker, who alone is afterwards considered as liable to the underwriter for the premium. When the broker has effected the policy (if not under a *del credere* commission) the assured may at any time demand it from him, paying him what he owes him at the time of taking it; and may place it, if he chooses, in the hands of another broker to be adjusted. In that case it is unnecessary to add, that the first broker will have nothing to do with the return of premium. Care must be taken, in considering this question, not to confound the double capacity of the broker, who

acts in two distinct characters, as two agents. He is agent for the underwriters, and also for the assured; first in effecting the policy, and in every thing that is to be done in consequence of it, and which, from the nature of the contract, is incidental to it. He is agent for the underwriter as to the premium, but for nothing else. He is supposed to receive the premium from the assured to the use of the underwriter. But the contract between the underwriter and the broker, whereby the former gives credit to the latter, is a clear and distinct contract and account. Exclusive of fraud and other similar circumstances, the premium, as between the insurer and the assured, is paid. For, though the premium be, in fact, only carried to the credit of the insurer in the broker's books, the underwriter may call upon him for it, and compel an immediate payment, without any reserve in the broker's hands to answer any returns of premium, or any thing else, which the insurer at a future time may be bound to pay to the assured. The returns of premium and the payment of losses are matters between the assured and the underwriter: they constitute a debt from the


underwriter to the assured alone, and not to the broker. The broker is not entitled to receive from the underwriter either the return of premium or the amount of a loss, without an especial authority from the assured. If indeed the broker act under a *del credere* commission, he becomes an agent of a different description. He is then, in substance, the owner of the policy: he is answerable to the insured for the loss: he is liable in the first instance, and he may set-off losses which have become due on all policies which have been effected under his commission *del credere*. In *Grove v. Dubois*, 1 T. R. 112. and *Bize v. Dickason*, *ibid.* 285, this doctrine, as relates to the privilege of a set off, and the right of deducting the amount of a loss, was first established. In the former case the plaintiffs were the assignees of a bankrupt underwriter, and the action was brought against the broker for premiums; for which the underwriter had debited him; but having acted under a *del credere* commission, it was holden that he was entitled to set off a loss upon a policy which had happened before the bankruptcy. In *Bize v. Dickason* the same doctrine obtained, and it was consider-

ed to make no difference, though the loss, which had occurred before the bankruptcy, was not adjusted till after the bankruptcy. See likewise *Wienholt v. Roberts*, 2 Camp. 586.

The case of *Shee v. Clarkson*, 12 East, 507, was the next case which occurred, and which, on the first view, seemed to extend the rights of the broker beyond what had hitherto been considered as their limits, both according to the usage of trade, and the reason and equity of the contract. In *Shee v. Clarkson* it was decided, that the broker, who effected a policy, being the common agent of the assured, and the underwriter, whilst the premium remained in his hands for one party, and the policy for the other, and having received notice of events which entitled the assured to a return of premium, (before an action brought by the underwriter to recover the full premium) was authorized to deduct such return, and only to pay over the difference to the underwriter. In that case indeed, the Court drew a distinction between what was due to the assured for losses, and what was due for return of premium: they considered the latter as part of the premium itself, which was

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not to be paid over, if the event on which it was returnable ascertained the amount of the deduction before the premium was paid; and that in such case the underwriter was entitled to receive no more in the first instance, than he would be ultimately entitled to retain on the balance of the premium account. By this determination, the rule which was to govern the rights of the respective parties on the contract, became more intricate than was suitable to cases of such frequent occurrence. The rule hitherto adopted between the broker and the underwriter had been simple and intelligible; it was defined with a suitable precision, and corresponded with those decisions which had obtained in cases of an analogous character. It was considered, that, as the assured had no concern in the contract between the underwriter and the broker as respected the premium, which was their own distinct account; so the return of the premium, and the payment of losses, were matters between the assured and the underwriter, in which a broker, who had not a *del credere* commission, could have no right to mix or engage. The payment for losses and the return of premium were new

claims, and of a distinct nature. They arose from events subsequent to the insurer's right to the full premium. The broker could not sue in his own name for the return of premium; how then could he, in an action brought by the underwriter or his assignees for premiums, set it off. It was merely an accident that the premium remained in his hand. But that, which was an incidental circumstance, could not give him a right of action or of set off, which is correlative.

The case of *Shee v. Clarkson* was much shaken in the subsequent cases of *Minett v. Forrester*, 4 Taunt. 541. and *Goldschmidt v. Lyon*, *ibid.* 534, and in the case of *Parker v. Smith*, 16 East, 382, the decisions in the Common Pleas were confirmed and acted upon in the King's Bench. In *Minett v. Forrester* it was determined, that an insurance broker, who was indebted to the estate of a bankrupt underwriter for premiums, could not, without an especial authority, set off against the debt sums due from the underwriter for return of premium. Whether the returns became due *before* the bankruptcy or *after* the bankruptcy? In that case, *Mansfield*, Ch. J. in delivering the judgment of the Court observed in

substance, that in *Shee v. Clarkson*, the judgment of the King's Bench seemed to have proceeded very much on the circumstance of the plaintiff (who in that instance was the underwriter himself) having been constantly in the habit of settling and adjusting with the broker, and always allowing, out of the premium which he was to receive, what was due from himself to the assured for returns of premium accruing for short interest, or for any other reason. He was therefore, in fair intendment, the common agent both of the underwriter and the assured. But where a bankruptcy had intervened and determined the agency, (which was the case of *Minett v. Forster*) the authority given by the underwriter ceased, and when he became a bankrupt his right to the premium was communicated to the assignees, who had never constituted the broker their agent, either with reference to an adjustment or otherwise; they had a right therefore to compel him to pay the premium for the benefit of the bankrupt's estate; and how could he make himself the agent of the assignees for the purpose of detaining money to be paid by the bankrupt to the insured? In *Goldschmidt v. Lyon*, the decision went upon

the same principle as in the former case, viz. that a broker who was indebted to the assignees of a bankrupt for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy, was not entitled to set off returns of premium due upon the arrival of ships which had arrived since the bankruptcy. In *Parker v. Smith*, which was likewise an action by the assignees of an underwriter against insurance brokers, for the balance of an adjusted account between the bankrupt and the defendants, and also for premiums on policies subscribed by the underwriter before his bankruptcy, it was determined, first, that the brokers were not entitled to deduct for returns of premium due on policies, the premiums of which policies formed a part of the adjusted account, but where the events entitling them to such returns were not known till after such adjustment. Secondly, Nor could they deduct for returns of premium on some of the policies for the premiums of which the action was brought, the events entitling them to which returns had happened before the bankruptcy, but the returns on which had not been adjusted. Thirdly, Nor could they deduct

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for returns on other policies,
for the premium of which the
action was brought, the events
entitling them to which re-
turns had happened *since* the
bankruptcy, but before the
commencement of the action :
the brokers not having a *del*

credere commission, nor being
personally interested in any of
the insurances.

The cases in the two Courts,
therefore, seem now in unison.

See likewise *Koster v. Ea-*
son, 2 Maule and Selw. 112.

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SITTINGS AFTER MICHAELMAS TERM,
56 GEO. III. AT GUILDHALL.

YEATS and Another v. PIM and Another.

Wednesday,
Dec. 15.

ACTION for a breach of contract upon the sale
of some bacon.

On the 29th of *March*, 1815, the defendants sold to plaintiffs 50 bales of bacon, warranted to be (*Penrose's*) prime singed bacon, at 68s. per cwt.; payable by a bill at two months from the landing; average for weight. The bacon was landed a few days after the contract. On the 31st of *March*, one of the plaintiffs examined a bale, and upon the 3d of *April* three more bales were weighed and opened. No objection was taken, and no allowance claimed. A bill was drawn by defendants on plaintiffs for the price of the bacon, which was accepted and duly paid. About the latter end of *May* plaintiffs made a final examination of the bacon, and rejected it on account of taint.

An usage of trade cannot be set up to contravene an express contract. Therefore, where A. agreed to sell to B. a quantity of bacon, which he warranted to be of a particular quality, part of which B. weighed and examined upon delivery at the wharfinger's, and paid for the whole by a bill at two months, but before the bill became due gave notice to A. that the bacon was not agreeable to the contract. Held that B.

could not give in evidence a custom in the bacon trade, that the buyer was bound to reject the contract, if dissatisfied therewith, at the time of examining the commodity; and that having neglected to do so in the first instance, he was excluded from future objections.

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The counsel for the defendants offered evidence, that there was a custom in the trade, upon the sale of bacon, to examine it a few days after the landing, if it was not imported at the time of the sale, and at the time of inspection to reject or accept it, or claim an allowance for damage or difference of quality; and that if the buyer did not at that time reject the contract, or claim an allowance, he was bound to accept the bacon without reference to the terms of the contract.

Best and *Vaughan*, serjeants, and *Marryat*, for plaintiffs, objected to this evidence of custom in a case where there was a warranty. The question was, whether, on the 29th of *March*, 1815, this bacon was prime singed bacon. No usage can countervail a special contract or defeat a warranty. Nothing short of an express acceptance of the commodity, amounting to a waiver of the contract, could be an answer to this action.

The *Solicitor General* and *Scarlett*, contra.—A conclusion may be made against the plaintiffs, (as evidence that the commodity complied with the warranty) who do not reject it when they may, but by their conduct induce the seller to think that they accept it. The seller may be deprived of important advantages by their delay. The shipper, against whom he has his remedy over, may fail. After two examinations, and a bill drawn and accepted, it was too late for the plaintiffs to change their minds. The custom, offered in evidence, was not unreasonable. It was not unusual to append a

custom to a particular contract. The days of grace upon a bill of exchange was a familiar instance. In like manner, upon a purchase of goods, though payment be due upon the sale, the contract being *debitum in presenti*, the usage of trade is constantly allowed to interpose, in order to give the buyer a certain extent of credit. Contracts, the creatures of custom, might be regulated by it; and, in the present case, the custom was not offered to contradict the contract, but as a reasonable qualification of it.

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HEATH, Justice.—It would breed endless confusion in the contracts of mankind, if custom were of any avail in a case like the present. I will admit evidence to shew that the buyer inspected the commodity, and made no objection to the quality; but no usage in a trade can deprive a man of the benefit of an express contract. By requiring a warranty, he is to be understood as excepting against all terms but such as are stipulated in the bargain. It is open to the defendants to prove that the plaintiffs acquiesced; and evidence may be admitted to shew that they were guilty of gross negligence in not examining and rejecting the bacon in time. But the evidence of custom cannot be received to alter the contract. Although one of the plaintiffs examined three bales, which he did not object to, it does not follow, if the remaining bales were carrion, that he was bound to accept them. It is *prima facie* evidence which may be explained or rebutted. If the shipper failed, the loss must attach on the party who gave

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the credit, not on the person who relied on the warranty.

Verdict for plaintiffs.

In the ensuing term, the *Solicitor General* moved for a new trial, on the ground that the evidence of the custom of the trade was improperly rejected at the trial. The Court, however, was unanimous in opinion, that the ruling of Mr. Justice *Heath* was perfectly correct.

All contracts made in the ordinary course of trade, without stipulation, warranty, or express provision, are presumed to incorporate the usage and custom of the trade to which they relate. The trade is the ground of the contract, and the custom and usage, as members or parts of that trade, compose a whole thing. The contracting parties, being conversant of such customs, are presumed, and the presumption is generally consistent with the truth, to have it in their intention, that their contract shall not exclude such usages. But as it would be absurd to say that any one should be bound to a condi-

tion, under whatever name, against his will, and contrary to his interest; so in all cases, where there is a warranty, or any special provision in the contract, contrary to the custom of the trade, such custom is excluded: the parties have varied the ordinary mode of dealing; and the custom, as a mere usage of trade, having no separate legal obligation, the expressed will contradicts the construction of law, and the limitation or enlargement is of course exempted. No usage, therefore, of trade, can be set up in contravention of an express contract.

The days of grace on a bill of exchange are no exception to the rule. Bills of exchange are totally mercantile contracts; days of grace are part of the nature of the thing: they are as much a part of the contract on a bill of exchange as the act of payment itself. They are not incidental but of essence: they are not adscititious, but the

thing itself. With respect to the sale of goods, if the contract be that they shall be paid for on a particular day, no custom can dispense with such a term. Nevertheless in ordinary cases, where no day of payment is expressed, the usage of the trade may introduce into the contract a particular credit, though the bargain, in form of law, raises a *debitum in præsent*. But the usage operates in that case, because not being excepted by express words, the parties are presumed to contract with reference to the general course of the trade.

A variety of cases has determined, that mercantile contracts are to be construed in conformity with the usage and custom of merchants. It has been doubted, however, by judges of the highest authority, whether this practice has not been extended too far. In *Anderson v. Pücher*, Lord Eldon, C. J. observes, that as much subtilty is raised by the application of usage to the construction of a contract, as by

the introduction of additional words, and that, if the matter were *res integra*, it might reasonably be questioned. 2 B. and P. 168. Mercantile contracts, however, when reduced to writing, are subject to the same rules of construction as other written instruments; therefore, in an action on a policy of insurance, "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence having been admitted that, by the custom of the trade, the risk on the goods, as well as on the ship, expired in twenty-four hours; the Court of K. B. granted a new trial on that ground, and on the new trial the evidence was rejected. *Parkinson v. Collier*, Park Ins. 416. See likewise *Robertson v. French*, 4 East, 135. and *Cutler v. Powell*, 6 T. R. 320., in which the doctrine of admitting evidence of usage to explain and construe mercantile contracts is strongly illustrated.

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Thursday,
Dec. 14.

CRAVEN and Others v. RYDER.

When the master of a ship receives goods on board and gives a receipt for them, it is his duty not to deliver the bill of lading, except to the person who can give the receipt in exchange. A. sells goods to B. to be delivered free on board a particular ship: he loads them on board, and takes a receipt from C., which purports that the goods were received "for and on account of A." Before the delivery, B. had sold the goods to D., who, without the knowledge and consent of A., obtains a bill of lading from C. B. becomes insolvent. Held, that A. is entitled to stop the goods *in transitu*, and that C. having refused to deliver them on the production of the receipt, is answerable to A. in an action of trover. A.'s right would have been the same, although the receipt had not contained the restrictive words, but had been in the general form.

TROVER to recover the value of some sugar. On 5th May, 1815, the plaintiffs entered into a contract with Messrs. *Bogle and French*, to sell them, at a credit of two months, twenty-four hogsheads of *Hamburg* loaf sugar, to be delivered by the plaintiffs "free on board the *George*, Captain *Ryder*." On the 11th of May, *Bogle and French* sold the sugars to *Caldas*, who paid for them; and *Caldas* subsequently sold them to *Bene and Co. of Hamburg*. The shipping order was in these terms, "To the commanding officer on board the *George*, Capt. *Ryder*; receive the undermentioned goods, for and on account of *Craven and Co.*" When the goods were shipped, a receipt was brought back from the defendant's mate in these words, "Received, 15th of May, on board the *George*, Captain *Ryder*, the undermentioned sugars for *Hamburg*, for and on account of *Craven and Co.*—*Robert Ramsay*, mate." It was in evidence that the usual form of a lighter's note was not to add to the receipt, "for and on account of the party;" but a general note only was given with the goods. The lighterman in this case had introduced, within a few months, a form which was peculiar to himself, and the mate had signed it on account of the defendant, seemingly without adverting to the contents. On the 17th of May, *Bogle and French* stopped payment,


and on the 23^d the lighterman demanded the goods on the plaintiffs' account; at the same time he exhibited the mate's receipt, the Custom-house order to re-land, and tendered the freight and primage to *Hamburg*. The defendant refused to deliver up the goods, on the ground that he had already executed a bill of lading to *Caldas*.

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Lens, for defendant, contended, that there was no pretence for a stoppage *in transitu*. After the delivery of the sugar on board the defendant's vessel, the property had been twice changed, and the sugars no longer remained in their first condition. The right to stop *in transitu*, however equitable in principle, must have a limit; there was no case where a sale has been made bona fide, and after a delivery of the goods, in which the right of stoppage *in transitu* has been admitted. The lighterman's note was capable of explanation, and only meant to shew that the plaintiffs had complied with their contract with *French* and *Bogle*, in "delivering the goods free on board." The sugars, indeed, might have been stopped in their way to *French* and *Bogle*; but how could the title of *Caldas* be impeached? The plaintiffs had no intention of exporting the goods; they were put on board by the direction of *French* and *Bogle*, and when once shipped in order to be sent to *Hamburg*, they became the property of *Bene* and Co.

DALLAS, Justice.—I am of opinion that this is a restrictive receipt. The Captain takes them on account of the plaintiffs. I think *Craven* and Co.

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never parted with their right of stoppage *in transitu*. Their title was never out of them. The sugars were sold to *Caldas* on the 11th of *May*, and they were in the plaintiffs' warehouse till the 14th.

His Lordship left the case to the Jury, and they expressed themselves of opinion, That it was contrary to the course of business, and to the defendant's duty, to give up the bill of lading without the receipt; that the defendant had received the sugars on account of *Craven* and Co., and had given a restrictive receipt accordingly.

Verdict for plaintiffs.

Solicitor General, Vaughan, serjeant, and *Marryat*, for plaintiffs.

Lens and *Best*, serjeants, and *Campbell*, for defendant.

[Attornies, *Brown*———*Nind*.]

In the ensuing term, *Lens*, serjeant, moved, that the verdict should be set aside, and a new trial granted, on the ground that the plaintiffs' right to stop the goods *in transitu* was gone, after there had been an absolute sale to *French* and Co., and two other subsequent sales. He relied upon the arguments which he had urged at the trial, and referred to

the case of *Lickbarrow v. Mason*, 2 T. R. 63., and cited 6 East, 21, in notis, for the sake of Mr. Justice Buller's judgment, as embracing all the law on this subject, and deciding the point.

Lord Chief Justice *Gibbs* observed, that the usage and custom of merchants was, that the person who was in possession of the receipt should alone

be entitled to the bill of lading; and that the captain ought not to have given the bill of lading, except to the person who could produce the receipt in exchange. Consequently, the person holding the receipt had a control over the goods, till he had exchanged it for the bill of lading. His Lordship added, that the plaintiffs had unquestionably not abandoned their right of stoppage *in transitu*, in case of the insolvency of the purchasers, until the goods were delivered; and that, although *French and Co.* might sell the sugars again, the plaintiffs might still reserve to themselves the right of stoppage. That the defendant, therefore, gave the bill of lading to *Caldas* in his own wrong, because, according to usage and common sense, he should not have delivered it without taking the receipt in exchange. "I do not," said his Lordship, "rely mainly on the particular form of the receipt (though that is not to be laid out of our consideration); but I think that if the receipt had been in the usual form, its effect would have been the same. The ground of my opinion is, that the original seller had never parted with his right of stoppage *in transitu*." The rest of the Court concurred. Rule refused.—*See, for a more*

full report, 2 Marshall's Rep. 127.

The case of *Lickbarrow v. Mason*, both in its principle and circumstances, is very distinguishable from the above case. That case determined, and the decision is undoubtedly of the first importance to commerce, that the consignee of goods, by the assignment of the bill of lading to a third person for a valuable consideration, might confer an absolute right and property upon such assignee, indefeasible by any claim on the part of the consignor; subject, however, to this restriction, that the assignment should be made with good faith to all parties, and without notice to the assignee that the goods were not paid for. In *Cuming v. Brown*, 9 East, 506, with a view to a more liberal commercial policy, the principle in *Lickbarrow v. Mason* was extended. In that case it was determined, that if the assignee of the bill of lading took the assignment, *bona fide*, without notice of any such circumstances as ought, in fairness to have tied up the hands of the consignee from a transfer, he acquired a good title against the consignor; and that therefore, although he knew at the time that the consignor had not ob-

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tained a money payment for the goods, but had taken the consignee's acceptance payable at a future day, not yet arrived, the consignor, nevertheless, could not defeat his title under the assignment, nor stop the goods *in transitu* upon the insolvency of the original consignee. But, in the present case, *Craven* and Co. are merely directed to deliver the goods in question *free on board a particular ship*. They are not directed to transmit, nor do they in fact transmit, any bill of lading, or any instrument capable of indorsement and transfer, to *French* and Co. Laying the restrictive nature of the receipt given by the defendant out of the question, and supposing it had been in the ordinary manner, (omitting the words, *for and on account of the plaintiffs*,"") it may be well to see how the case would then stand. There is no doubt that if the plaintiffs had transmitted a bill of lading to *French* and Co., and *French* and Co. had assigned it to *Caldas* for a valuable consideration, and without notice to *Caldas* of any circumstance which might have impeached his title, the right of stoppage *in transitu* would have been superseded, upon the authority of the above cases. But as no such transferable

title was given by the plaintiffs to *French* and Co.; as it was a sale, after the ordinary manner, of goods to be forwarded to order, and as the goods were on their *transit*, it should seem, upon the principle of all the cases, that the vendees could not by an intermediate sale, without the privity and assent of the plaintiffs, though for a valuable consideration, defeat the right of stoppage *in transitu*. They could not by a sub-contract give to a third person any larger right and title than that which they themselves possessed. In a word, as there was no bill of lading in the case, no negotiable and transferable instrument put into the possession of *French* and Co. by the plaintiffs, which, according to the custom of merchants, was capable of creating a property in another by indorsement, delivery, or transmission, the transaction was to be viewed in the ordinary light of a sale of goods, which, having been sold by the original vendee to a third person, previous to delivery, and without the assent of the vendor, the latter had a clear right to stop *in transitu* upon the insolvency of the first purchaser. See note page 20, where the cases of stoppage *in transitu* are collected and examined.

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GROSS and Another v. LA PAGE.

Friday,
Dec. 15.

THIS was a special action on the case to recover damages for a breach of contract upon the sale of some hemp.

On the 9th of *June*, 1815, the plaintiffs sold to the defendant 25 tons of sound, *Petersburgh*, clean hemp, warranted to be of a good and merchantable quality, at 55*l.* per ton. The ship, on board of which the hemp was to be conveyed, was to sail from *Petersburgh* before the 31st of *August*, and the hemp was to be taken according to the landing scale when the vessel arrived. The hemp arrived in *July*, 1815, and the price had fallen considerably before its arrival. The name of Mr. *Metcalfe*, who was the broker, had been used for the purpose of the hemp passing the landing scale. It stood in the London Docks in his name up to the 21st of *August*. But the plaintiffs were the importers of the hemp.

Best, serjeant, and *F. Pollock*, for defendant, objected, that the plaintiffs, who were the importers of the hemp, were not members of the Russian Company. They relied on the 10 and 11 Wm. 3. c. 6., by which the trade to *Russia* was confined to the Fellowship of the Russian Company, and to such persons as were admitted of it, as a defence to an action brought against him by A. for not fulfilling his agreement.

A. contracts to sell to B. some Russian hemp; and the ship on board of which the hemp is to be conveyed, is to sail from *St. Petersburg* by a given day. A. is the importer of the hemp. By the stat. 10 and 11 W. 3. c. 6., it is illegal for any subject of this realm to carry on a trade with *Russia*, unless he be a member of the fellowship of merchants trading to those countries. A. is not a member of the Company; but the hemp is protected at the landing scale, and in the docks, by using the name of a broker, who was one of the fellowship. Quære, if this be such an illegality in the contract as will render it void, and entitle B. to avail himself

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that fellowship. The plaintiffs had been trading in defiance of that act: the bill of lading shewed that the hemp was imported by them. But the defendant had a right to expect that they had obtained the freedom of that company, otherwise the hemp might be forfeited or seized. Under such circumstances, the defendant could not be compelled to take it.

The *Solicitor General*, and *Marryat*, for the plaintiffs.—It is no objection to the contract. The act may prohibit the plaintiffs from trading to *Russia*, not being members of the Company; but the importation of the article is not therefore prohibited. After the commodity arrives, the shipper, though not free of the Company, may sell it, though he could not legally import it. It is not the less a subject of contract because it is illegal to import it. The parties themselves may be under disabilities; but the article is of free trade.

DALLAS, Justice.—I confess I am much struck with the objection which has been made by the defendant's counsel. The importation is prohibited to all but members of the Russian Company. If imported by unlicensed persons it is seizable. The amount of the objection is, that the defendant cannot be compelled to accept an article which might be liable to seizure in the hands of a purchaser. I will not stop the cause, but I will save the point.

The plaintiffs had a verdict on the merits.

The *Solicitor General*, and *Marryat*, for the
plaintiffs.

Best, serjeant, and *F. Pollock*, for the defendant.

[Attorneys, *Ricington and Co.*——— *Tilson and P.*]

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In the ensuing term, *Best*, serjeant, was about to move upon the point reserved at the trial, but the defendant having neglected to give the previous notice of the motion to the Judge who tried the cause, in pursuance of the new rule of practice, the Court refused to entertain the application.

There have been numerous cases, beginning with *Holman v. Johnson*, Cowp. 341. down to *Waymel v. Reed*, 5 T. R. 597, in which the Courts have determined what contracts were illegal, on the ground that they encouraged smuggling, and were in breach of the revenue laws of the country. In the present case there was no fraud upon the revenue, on which ground the smuggling cases were decided; nor is there any clause in the act of parliament making the contract of sale illegal; at most, it is the breach of the rights of a corporate company.

If this had been an insurance on hemp to be imported by the plaintiffs, a question might have arisen whether, in case of a loss, the underwriters would have been liable? Probably, they would not. But there is an obvious distinction between an insurance to facilitate and cover an illegal traffic in goods, and a contract for the sale of those goods. The present was not a contract to indemnify the plaintiffs against any loss in the prosecution of an illegal act; but it was a contract for the purchase of the commodity when imported.

This case does not seem to fall within the principle of *Blachford v. Preston*, 8 T. R. 89. *Gallini v. Laborie*, 5 T. R. 242.; or *Ribbans v. Cricket*, 1 B. and P. 264. In all which cases the contracts were holden to be illegal. In *Blachford v. Preston*, which was the sale, by the owner, of the command of a ship employed in the East India Company's service, without the knowledge of the Com-

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pany, the Court held that an action could not be maintained on the agreement, because it was in violation of the laws and regulations, and in fraud of the East India Company; and in contravention, moreover, of a great system of public policy. In *Gallini v. Laborie*, where it was holden that no action could be maintained for breach of an agreement to perform at an unlicensed theatre, (the stat. 10 G. 2. c. 28., prohibiting all theatrical representations without licence) the decision was grounded upon the obvious reason, that no man could be compelled to do what must subject him to legal penalties. In *Ribbons v. Cricket*, the plaintiff was impliedly prohibited from suing on that particular kind of contract by the 7 and 8 Wm. 3. c. 4., which forbade the thing to be done. Neither does the present case fall within the principle which guided the several determinations in *Sullivan v. Greaves*, Park on Insurance, 8. *Mitchell v. Cockburns*, 2 H. Bl. 379. *Booth v. Hodson*, 6 T. R. 405. *Branton v. Taddy*, 1 Taunt. 6.; and other cases of the same class. These cases were founded on agreements and contracts in direct violation of the stat. 6 Geo. 1. c. 18. In *Sullivan v.*

Greaves, the action was brought by one partner against an insurance broker to recover a moiety of the loss received by the latter from another partner; the first having paid the whole loss to the assured; but it was determined that the action could not be maintained, because its object was to enforce an illegal contract of partnership. And on the same principle, that the action was brought in affirmance of the illegal contract, was the case of *Mitchell v. Cockburns*, in which *Eyre, C. J.* said, that the action arose immediately out of an illegal contract. In *Booth v. Hodson*, the plaintiff had insured in violation of the act of parliament, and the claim arose out of that transaction. *Branton v. Taddy* was decided upon the same principle.

In the present case the distinction seems to be obvious. The plaintiffs do not seek to enforce any illegal contract; they do not seek to cast any duty upon the defendant which would subject him to penalties. With respect to the contract, they have violated no law or duty; though with regard to the importation of the commodity, which was collateral to, and distinguishable from, the contract, they have in-

fringed the rights of others. They may have thus incurred a penalty: but it cannot be said to rescind the contract of third parties who had no participation or privity in the importation. The contract, it is to be remembered, was not to import the hemp. *Who* were to import the hemp was no consideration of the parties at the time of the bargain. It was in fact a contract for the sale of hemp, to be shipped from *Petersburgh* before a given day, and the bargain was to be concluded upon the arrival of the vessel with the goods. Now the sale was not contrary to any law, though the importing of it, by the plaintiffs, might be in contravention of the rights of the Russian Fellowship.

In *Johnson v. Hudson*, 11 East, 180, it was holden by the Court of K. B., that a factor, selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at *Guernsey*, of which a regular entry was made on importation, but without having entered himself at the Excise Office as a dealer in tobacco, nor having any license as such, might yet maintain an action against the vendee for the value of the goods sold and delivered; and

this, though the tobacco were sent to the defendant without a permit, at his desire.

The decisions on the smuggling cases were here pressed, but the Court upheld the contract, on the ground that there was no fraud upon the revenue, and that it was at most a breach of certain regulations protected by penalties. So a person who sells goods, knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price, if he yields no other aid to the illegal transaction than selling the goods, and procuring permits for their delivery to the agent of the purchaser. "To deprive the vendor of his just right of payment (says *Mansfield*, C. J.) it is necessary he should be a sharer in the illegal transaction." *Hodgson v. Temple*, 5 Taunt. 181. The cases on this point are numerous; and the reader, by referring to them, will be better enabled to make up his opinion on the present case. *Fackney v. Reynons*, 4 Burr. 2069. *Robinson v. Bland*, 1077. *Holman v. Johnson*, Cowp. 341. *Petrie v. Hannay*, 3 T. R. 418. *Biggs v. Lawrence*, 3 T. R. 454. *Clugas v. Penaluna*, 4 T. R. 466. *Waymel v. Reed*, 5 T. R. 597.

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The following is an abstract of the act of parliament which, as it has been seldom adverted to, and considering the extent of our present trade with Russia, may be of use. It is entitled, "An Act to enlarge the Trade to Russia."

Whereas king *Philip* and queen *Mary*, by their letters patents in the first and second years of their reign, being willing to animate, advance, and further, the persons in the said letters patents named, in their good purpose and profitable adventure, for the discovering, descrying, and finding out isles, lands, and territories unknown, lying to the northward, and by English subjects before then not commonly frequented by sea, as well for the glory of God as for illustrating the royal dignity in the increase of the revenues of the crown and the general wealth of this realm, did incorporate certain persons by the name of *merchants' adventurers for the discovery of lands, &c. &c. &c.* with powers to make statutes, acts, and ordinances, for the good government of the said fellowship, and also to admit

unto the said fellowship persons to be free of the same; and that every person or persons so to be admitted should, from the time of their admittance, be free of the said fellowship; and that the said fellowship should have and enjoy the sole trade to all the main lands, isles, ports, havens, creeks, and rivers of the Emperor of *Russia*, and to all other lands, &c. &c. &c. mentioned in the said letters patents.—And whereas the liberties, powers, and privileges, granted by the said letters patents, were afterwards, by an act of parliament, made in the eighth year of the reign of Queen *Elizabeth*, ratified and confirmed to the said fellowship and their successors, by the name of *the fellowship of English merchants for the discovery of new trades*, with power to have and enjoy all and singular the liberties, privileges, jurisdictions, powers, and authorities, as well in the said letters patents as act of parliament mentioned or contained, with a prohibition that no subject or denizen of this realm should traffic to, visit, or frequent any of the places granted by the said act to the said fellowship, but by order, agreement, or consent of the governor, consuls, and assist-

ants of the said fellowship, or the major part of them; upon pain that every person and persons so offending should forfeit and lose (*pro facto*) every such ship and ships, with the appurtenances, and all such goods and things whatsoever, as by any such persons should be by any means, directly or indirectly, carried, conducted, bought, or exchanged, in, at, or to, through, or from, any of the places prohibited, contrary to the true intent of the said act; one moiety thereof to the queen, her heirs, &c. and the other to the said fellowship. And whereas the easy admission into the said fellowship will, in all probability, tend very much to the enlarging the said trade for the public good, and for that there is no mention made, either in the said letters patents or act of parliament, upon what terms persons shall be admitted, or what certain fine shall be taken by the said fellowship, for the admitting persons to be free thereof; therefore for the ascertaining hereafter what fine shall be taken by the said fellowship for the said admissions, and for enlarging and encouraging the trade to *Russia*, and other places mentioned in the said charter; Be it enacted, by, &c. &c. that

from and after the 25th day of March, 1699, every subject of this realm desiring admission into the said fellowship, known by the name of the *Russia* company, on request in that behalf to the governor, consuls, and assistants, or any three of them, shall be admitted into the said fellowship, and shall have, use, and enjoy, all the liberties, &c. &c. &c. granted to the said fellowship, either by the said letters patents or act of parliament, the same as any other member may, or can have, such subject paying for his admission for the use of the said fellowship only, the sum of five pounds, and no more.

Sec. 2. And be it further enacted, by the authority aforesaid, that from and after the said 25th day of March, the sum of 5*l.* only, and no more, shall be demanded or taken by the said fellowship for any admission to the freedom thereof; any by-law, statute, or ordinance of the said fellowship made, or to be made to the contrary thereof, in any wise notwithstanding.

Sec. 3. And be it, &c. by, &c. that where any person or persons residing in any outport, or any other place within this realm, dominion of *Wales*, or town of *Berwick-upon-*

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*Tweed*, shall make request to be admitted into the said fellowship as aforesaid by his agent or deputy, making tender of 5*l.* for his admission, the said governors, consuls, and assistants shall, under the common seal of the said fellowship, within ten days after such request, appoint one or more person or persons to admit such person or persons into the freedom of the said fellowship, and to administer to him, or them, the oath to be taken by the freemen of the said fellowship; which oath they are

hereby empowered to administer; which admission and administration of the said oath shall be as good and effectual as if the same were actually done by the said governor, consuls, and assistants.

Sec. 4. And be it, &c. by, &c. that the commissioners of his Majesty's customs shall, at every session of parliament; lay before both houses a true account, in writing, under their hands, of what naval stores shall have been imported into this kingdom by any persons trading to *Russia*.

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## FAITH and Others v. PEARSON.

**T**RESPASS for breaking and entering the plaintiffs' vessel, forcibly detaining her whilst on her voyage from *Senegal* to *Great Britain*, carrying her to the island of *Barbadoes*, in the *West Indies*, and detaining her for several months. There were various counts in which the injury described was in substance the same. The defendant pleaded:—1st. Not guilty. 2d. That at the time of the grievance committed the defendant was commander of one of his Majesty's ships of war, the *Benbow*; and that he had seized the plaintiffs' vessel because she had no manifest on board. 3. That he boarded the plaintiffs' ship in order to ascertain whether the ship or cargo belonged to any of the enemies of the king; and that, after diligent examination of her papers and cargo, &c. having probable cause of suspicion that part of the cargo was American property, he detained the ship, and directed her to be carried into *Barbadoes*, and kept her there, to be dealt with according to law. 4th. The fourth plea stated, that the defendant, having probable cause of suspicion that the ship was American, seized her as a lawful prize.

Where a ship is seized by the commander of one of his Majesty's vessels as prize, and is afterwards released without any suit being instituted against her, if the plaintiff have any ground of complaint, his redress is in a Court of Admiralty; and no action can be maintained at common law, either of trespass for seizing the ship, or of false imprisonment for confining the captain and mariners.


The circumstances were these: on the 31st of *March* the brig *John* sailed from *Senegal* to *London*; on the 5th of *April* she fell in with the defendant, who was the captain of his Majesty's ship the *Benbow*, and had a squadron under his com-

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mand. She was brought to by a shot which passed between her masts; and the defendant immediately sent on board his prize master, his third lieutenant, and a gang of men: they examined the ship, the crew, and the papers; the lieutenant observed, that the ship looked like an American; that she had American canvass and rigging; and that the captain and the mate had the appearance of Americans. He took the master on board the *Benbow* with him, and the ship's papers. The master returned in half an hour, with the third lieutenant, who wished him a good voyage, and left him. Not long after, another shot was fired from the *Benbow*, and again brought them to. The same persons came on board, and ordered the mate and all the able seamen to join the *Benbow*. The defendant desired to know whether the *John* had any slaves on board, and being informed that she had none, he asked for the manifest, but none was produced; he then examined the cargo book, and observed that a leaf had been torn out. He added, that the ship was not in the proper course for *London*. He took possession of all the ship's papers, and put them under seal, and then directed the vessel to be taken in tow by a brig belonging to his squadron, and in this state she arrived at *Barbadoes*. After a few days every thing was restored, and the vessel was set at liberty; but the master had previously been sent a-shore in custody of one of the defendant's officers, and the mate and crew had been treated as prisoners of war. The vessel made *London* on the 10th of *August*, 1814. The *John* had been in the American service; she had been taken by an American privateer, but recaptured. She had, at the time of

the seizure, American rigging and canvass. The reason stated for her not having a manifest on board was, that there was no Custom House at *Senegal* or *Goree*; and that when a vessel was bound outwards no papers were ever given her by any public officer. She had, however, a clearance, which was a document signed by the Collector of the duties inwards, certifying that those duties had been paid. The point in which she was captured was in her fair course for *England*; and a witness stated that she would in all probability cross that point in making her way home. The vessel was sailing as close to the wind as possible; and no suspicion could reasonably attach that she was out of her course.

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The *Solicitor General*, and *Best*, serjeant for defendant, contended, that the action could not be maintained. The question is not whether the ship be good and lawful prize; not whether there was strong and reasonable suspicion; but whether the defendant did not, in fact, take the *John* as prize. If so, a court of common law cannot try this question; it belongs to a Court of Admiralty. If such cases were to be the subject of a common law jurisdiction, no captain could venture to detain a ship for an hour after he had examined her papers. They cited *Le Caux v. Eden*, Douglas, 594. If the plaintiffs have a right to recover, the captain, and every officer and sailor, would severally have a right to bring an action of trespass. The question, therefore, is, did the defendant, exercising, if they please, an erroneous judgment, take the *John* as prize? If so, no action lies at common law.

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The want of a manifest was a strong ground of suspicion. The 26 G. 3. c. 40. s. 3. requires the masters of vessels, before clearing out from the King's dominions in foreign ports, to deliver a manifest to the officer or collector of the customs there; and, if there be no officer or collector, then to some principal officer or magistrate of the place, who are to cause a duplicate to be made, and to indorse upon the original manifest the day and year when it was produced, and to return it to the master of the vessel before she clears out. Add to this, that the vessel had been in the American service, and had, at the time, American rigging and canvass on board. They contended, that these circumstances, though they did not make the vessel a subject of prize, constituted a strong ground of suspicion, and warranted her detention.

GIBBS, C. J.—I am of opinion that the present action cannot be maintained: though the capture might have been improper, a court of common law has no jurisdiction. The injured are not without remedy, but this is not their remedy. If such an action might be supported here, the consequence would be, that every mariner might bring a separate action against the captors. The law has established a proper tribunal in the Courts of Admiralty, who are better acquainted with the principles of such cases, and can apply themselves to each particular, and examine every circumstance. In a case, whether a capture be prize or not, they enquire whether the captain has misconducted himself: if he has, they give the injured party a suitable recompense. There is nothing in the plaintiff's case which

does not shew that the defendant seized the *John* as an American prize; and if she were seized under this impression, there is an end of the question. The want of the manifest was a strong circumstance that she was not British. She had been in the American service; she had been fitted out in that service, and had the rigging and canvass of that nation on board. Then she had no manifest. The defendant sends a prize master on board; the captain and officers are treated as prisoners of war. On the whole, therefore, I am of opinion that this ship was seized as prize, and that the present action cannot be maintained. I consider it purely upon the general issue, and not on the special pleas.

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Plaintiffs nonsuited.

*Lens*, and *Vaughan*, serjeants, and *Abbott*, for plaintiffs.

The *Solicitor General*, and *Best*, serjeant, and *Richardson*, for defendant.

[Attornies, *Allan* — — *Egan* and Co.]

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In the ensuing term, *Lens*, serjeant, moved to set aside the nonsuit. He contended, that it ought to have been left to the jury to say, whether the seizure was *as prize*, or on any other ground. The case of *Le Caux v. Eden*, did not decide that the plaintiffs could not recover where there were several conjoint pretences for the seizure, but only where the ship was taken as prize; that action, he observed, was for false imprisonment; *here*, the only question was, whether the ship had been seized for this cause only. The defendant ought to have been called upon to prove that, in fact,



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the vessel had been seized as prize, and that this was not a mere after-thought on his part.

Lord Chief Justice *Gibbs* repeated in substance the opinion which he had expressed at the trial. He added, I am still of opinion, that this ship was seized as prize, and I am not sure that I ought not to have stopt the cause sooner than I did. The rest of the Court concurred.—Rule refused.—2 *Marshall's Rep.* 133.

The cases of *Le Caux v. Eden*, Dougl. 570, and *Lindo v. Rodney*, *ibid.* have so fully established the maxim, that captures made on the high seas, *jure belli*, are exclusively within the conusance of the Courts of Admiralty, and thereby entirely exempted from the jurisdiction of the common law, that it is unnecessary to review the principles of the present decision. The reason is as simple as the maxim. Such cases, whether of capture or detention, form the subject matter of the Admiralty jurisdiction. They often arise from circumstances which could not be given in evidence in Courts of Justice without great public mischief; and are frequently made upon the discretion, the opinion, the apprehension, of

naval officers, which can only properly be examined by the equitable jurisdiction of Courts proceeding in the latitude of the law of nations.—Subsequent, however, to the cases of *Le Caux v. Eden*, it has been questioned, whether the common law should not exercise a jurisdiction, so far at least as to ascertain whether a capture or detention have been made upon reasonable and probable grounds. Would not this be at once to determine the question. In order to decide the reasonableness of the capture, would it not be necessary to enter into the evidence of the circumstances which determined the defendant to make it. In many cases the discretion of the king's officers, acting on the high seas, necessarily requires a most extensive latitude. They may act, and in some cases are bound to act, upon suspicion; they may act upon secret communications; they may act upon innumerable causes, which, from their vagueness, have not a sufficient body to be tangible at common law. But the rules of evidence in the Courts of Admiralty are framed accordingly; and a long practice and an uninterrupted course of precedents have marked out an equitable compass to their dis-

detention, and administered a remedy against a dangerous generality or abuse of power. It is no answer to say a Court of Admiralty has acquitted a ship seized as prize. There might have been cause for the detention, though none for the condemnation. There might be a reasonable suspicion upon which an officer would be wanting in his duty if he should not make a seizure. The Courts of Admiralty administer justice between the parties in all those cases. On the one hand, they necessarily protect the proper discretion of the king's officers, and will not subject them to ruin for errors natural and venial in the exercise of a general prudence. On the other hand, they will equally protect the neutral, or the native merchant, from oppression, caprice, or any loss and damage, whether from negligence or criminal indifference. The rule, therefore, seems to be this:—Whenever it appears, incidentally, in the trial of a question of wrong committed on the high seas, by capture or detention, that such capture or detention has been made *bona fide as prize*, a Court of common law has no jurisdiction; they must dismiss the subject to its proper court, the instant the question of

prize or no prize presents itself upon the evidence.

With respect to privateers, or letters of marque, the Courts of Admiralty have a more extensive jurisdiction than as respects king's ships. As regards the former, if any act of oppression, cruelty, or general abuse, have been committed, they have not only the power of awarding a suitable compensation to the party injured, but they are authorised to deprive them of their letters of marque. They, in fact, act as a Board of Admiralty to ships of such denomination, and have their summary jurisdiction. The law is laid down by the Prize Act, which expressly inflicts on all acts of cruelty the forfeiture of the letters of marque. In *5 Robinson, 9*. Sir *William Scott*, speaking on this point, says, "I consider this to be no more than a formal declaration of what was the ancient law of the Admiralty." As regards the king's ships, they are, in the first instance, more immediately under the superintendence of the Lords Commissioners of the Admiralty. The dignity of the flag, and even of the officers, puts them in a degree above the necessity of this vigilant controul.

It might be easy to cite

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cases in which the courts of common law have disclaimed a jurisdiction over matters of an analogous kind. But the rule is sufficiently prominent in all of them.

It may be necessary however to observe in order to mark the distinction, that the case of *Le Caux v. Eden* was an action of trespass for false imprisonment of the plaintiff's person. In the capture or detention of a ship, the officers and crew are necessarily imprisoned for a time; and if the principal question, that of seizing the ship, belong exclusively to the Admiralty jurisdiction, to separate the question of prize or no prize, and that concerning the incidental damage, would be to divide between two different jurisdictions the same entire transaction. It is equally a trespass to take a man's ship as to take his person; but if the original or principal matter be not conusable at common law, neither are the consequences. 1 Lev. 243, 2 Lev. 25. Molloy, lib. 1. c. 4. § 32.

The common law jurisdiction, however, is not excluded, without a just consideration of the greater advantages to be obtained before that tribunal to which the case is referred.

The promptitude of the de-

cisions of the Courts of Admiralty is a great benefit to both parties; for, so admirably framed are the rules of that Court for accelerating business of this kind, that a cause can hardly last beyond a month. There is another great convenience in the Admiralty suit, that all parties concerned may join in one libel; whereas if an action at common law could be supported, the numberless suits to which every individual amongst the captors would be exposed, in the circumstance of costs alone, independent of damages, would bring ruin upon the parties involved in them.

All the cases which have been determined upon this subject have been decided upon the general issue pleaded by the defendant. No special pleading can be necessary, because the courts of common law have not a concurrent jurisdiction, but the Courts of Admiralty have the sole and exclusive concurrence. If the capture be, *prima facie*, a trespass at common law, it would be incumbent on the defendant to plead specially that he seized the ship as prize, and what was the cause, or ground of seizure. The plea of *not guilty*, therefore, is the proper and sufficient plea; it is in the nature of a denial of the jurisdiction of the

common law courts, and an assertion that the question is *alieni fori*. In the great case of *Rous v. Hassard*, cited in *Le Caux v. Eden*, Douglas, 581, in which the question was, whether an action of trespass would lie for taking a ship as prize, Lord Chief Justice Lee, having called two civilians to his assistance, delivered the judgment of the Court: that, though for taking a ship on the high seas trespass would lie at common law, yet, when it was taken *as prize*, though taken wrongfully, though it were acquitted, and though there were no colour for the taking, the judge of the Admiralty was judge of the damages and costs, as well as of the principal matter. And his Lordship laid it down as law, that if such an action were brought in England, and the defendant pleaded *not guilty*, the plaintiff could not recover.

Admitting the question of prize or no prize to be of exclusive and peculiar jurisdiction in the Courts of Admiralty, it has been contended notwithstanding, that if the sentence of that Court shall declare the ship to be no prize,

an action may be maintained at common law. But to this it may be replied, if the original matter be not conusable by the common law, the subsequent matter cannot; the whole question must altogether be appropriated to the jurisdiction of the Admiralty. "That sentence (says *Buller*, Justice, in his admirable judgment, delivered in *Le Caux v. Eden*) does not alter the nature of the original taking. It was still a seizure as prize, which the common law does not take notice of, as a trespass; and the sentence cannot make that a trespass, which was not so at the time when the fact was committed.

"Upon the whole, (addressing himself to the case of *Le Caux v. Eden*) as the plaintiff has had, or may have, a remedy elsewhere, as there is no case in which it has ever been holden that such an action can be maintained, and it would be attended with great mischief and inconvenience if it could be maintained, and as there are several authorities which say, the action will not lie, I am of opinion that there must be judgment for the defendant."

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WESTWOOD v. BELL and Another.

A., a merchant, employs B. to effect some policies of insurance; B., unknown to A., employs C., who applies to the defendants, who are insurance brokers. C. gives the defendants no reason to suppose that he was not acting as a principal, and they effect the policies in their own names, as agents. At the time of this transaction C. was indebted to the defendants on a balance of accounts. In an action brought by A. to recover the policies on tendering the premium and expences: Held, that the defendants had a lien upon them until C.'s debt was satisfied.

**T**ROVER to recover a policy of insurance.—  
*Hebden* and Co. of *Leeds*, had been employed by the plaintiff, as agents, to effect an insurance on goods on board the *Sally* and *Speculator*. *Hebden* and Co. employed *Robinson* and Son to procure the policies, and *Robinson* and Son transmitted to them copies of two policies, which purported to have been effected by *Robinson* and Son, and debited *Hebden* and Co. with the premiums and expences. *Robinson* and Son did not effect the policies; but, without the knowledge of *Hebden* and Co. or plaintiff, they applied to one *Clarkson*, who employed the defendants, who are insurance brokers; and the defendants effected the policies in their own names, as agents. The defendants had no knowledge that any other person was interested in the policies except *Clarkson*, whom they debited with the premium, and who, at the time of this transaction, was indebted to them on a balance of accounts. The defendants claimed a lien upon the policies till their demand on *Clarkson* was satisfied. The *Sally* was lost: the plaintiff tendered the premium and expences on both the policies; but the defendants refused to deliver them up, until *Clarkson's* debt was paid.

*Lens*, serjeant, for the defendants contended, that the plaintiff was not entitled to recover. The defendants have effected the policy without notice

that it was not on account of the person from whom they received the order ; they have therefore a lien upon it for their general balance. They must be supposed to have made advances to *Clarkson* on the credit of the policies which were allowed to remain in their hands. They have a right, therefore, to satisfy their general balance, whether before or after notice communicated to them of the plaintiff's interest.

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He cited, *Mann v. Forrester*, 4 Camp. 60. *Snook v. Davidson*, 2 Camp. 218.

The *Solicitor General*, *contra*.—If a merchant puts goods in the hands of a factor, and the factor places them with another merchant, who makes him advances upon them, he does not thereby obtain a lien against the original owner. If an agent represent himself to have a power, with which he is not entrusted, his principal is not bound by his acts. The person who gives credit to the representations of an agent must run the risk of their being true or false.—*Lanyon v. Blanchard*, 2 Camp. 597.

GIBBS, C. J.—In the case put, it is assumed that the goods originally belonged to the merchant ; and when a merchant trusts goods out of his hands, they cannot be burthened with any charges but those to which he has consented to subject them. I subscribe to the doctrine in *Lanyon v. Blanchard*. But, in that case, the agent represented that he had authority to indorse the bill of lading ; he had none ; therefore he could not bind the principal. The

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plaintiff has founded himself on false grounds, viz. that the policy was his property; it never was his property. In its creation it was a policy subject to the rights of the defendants against *Clarkson*. The contract was as between principals; *Clarkson* gave the defendants no reason to suppose that he was not a principal; and, because they treat him as a principal, they undertake the duty. The defendants, therefore, cannot be stripped of their lien. The plaintiff, notwithstanding, has his remedy against *Robinson* and Son, but the present case stands on principle and authority. I should have determined it on principle without authority.

Plaintiff nonsuited.

The *Solicitor General*, and *Littledale*, for the plaintiff.


*Lens*, and *Copley*, serjeants, and *Campbell*, for defendants.

[Attornies, *Dennetts* and G. ——— *Holt* and F.]

Where a factor, under a *del credere* commission, sells goods as his own, and the buyer knows nothing of the principal, the buyer may set off any demand he may have upon the factor against the demand for the goods made by the principal. This was the case of *Georgs v. Claggott*, 7 T. R. 359. But if an agent disclose his principal at the time, it is clear that he cannot pledge the property of such principal to another, with whom he is dealing, for his own private debt. Thus, in *Maans v. Henderson*, 1 East, 335, it was deter-

mined, that an English subject, in time of war, informing the broker that the property insured was *neutral*, was sufficient indication to the broker that the party acted as agent, and not on his own account, and that therefore the rights of the principal could not be affected by the state of accounts between the agent and the broker. If a factor pledge the property of his principal, the latter may recover the va-

lue of it in trover against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee. *Daubigny v. Duval*, 5 T. R. 514. It is clear, however, that a sub-agent cannot acquire the broker's general lien, because a lien is a personal right, and cannot be transferred. Vide *M'Combie v. Davis*, 7 East, 6. *Man v. Shifner*, 2 East, 523. 529.

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## AUSTIN and Another v. DREWE.

A policy of insurance (against fire) is effected on the stock and utensils of a sugar house, the different stories of which were heated by a chimney running up to the top. By the negligence of the plaintiffs' servants, in omitting to open the register, the heat is considerably increased, by means of which large quantities of the sugar are spoiled; but no damage was occasioned to any thing but the sugar, and no greater fire existed than on ordinary occasions; held, that this was not a loss within the policy.

**C**OVENANT on a policy of insurance against fire, on the stock and utensils in the plaintiffs' sugar house. The declaration averred a damage by fire on the 8th December, 1813. The defendant pleaded, that the damage was occasioned by the negligence and improper conduct of the plaintiffs and their servants, in regulating and managing the fires in their sugar house; and that the stock and utensils were damaged by the smoke arising from such fires; without this, that they were damaged by fire in the sugar house within the meaning of the policy.

The plaintiffs were sugar bakers. The sugar house contained eight stories, in each of which were raw sugars undergoing preparation. In order to convey heat throughout the premises, there was a chimney which formed nearly one side of the house, along which a flue ran, for the purpose of communicating warmth to each room. In one of the stories was a register, which was shut at night, when the fires were extinguished. On the day when the damage took place, the plaintiffs' servant had lighted the fire in the morning without opening the register; by these means the several rooms were filled with sparks and smoke; the sugar was damaged by the excessive heat, and some of the syrup spoiled; the beams and cieling in the upper stories were blackened, and the walls a little blistered. No

damage of moment was occasioned to any thing but the sugar; there was no greater fire than was ordinarily used for the purposes of sugar baking, and no part of the substance of the premises was injured by fire.


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*Vaughan*, serjeant, for the defendant, contended, that this was not a damage by fire within the meaning of the policy.

The *Solicitor General*, contra.

GIBBS, C. J.—I am of opinion that this is not a loss within the policy. No greater fire existed than was necessary for the purposes of the business. By omitting to open the register, heat and smoke have been forced into the rooms where the sugars were preparing; the heat produced the mischief: no sensible damage resulted from the smoke and sparks, and the occasion which produced the excess of heat was not a fire against which the defendant had undertaken to indemnify the plaintiffs. The servants had neglected to open the register. What is this but a bad management of their own machinery? The fire is where it ought to be; no more than it ought to be. But it received a false direction by the irregular and improvident conduct of the plaintiffs' servants. As no substance, therefore, was taken possession of by the fire, which was not intended to be fuel for it; as the sparks and smoke caused no mischief, but as the damage arose from an excess of heat in the rooms, occasioned by the register being shut, I

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am of opinion, that the plaintiffs are not entitled to recover.

The jury found a verdict for the defendant.

The *Solicitor General*, *Lens*, serjeant, and *Gaselee*, for plaintiffs.

*Vaughan*, and *Copley*, serjeants, and *Tindall*, for defendant.

[Attornies, *Gregson* and Co.———*Shaw* and Co.]

In the ensuing term the *Solicitor General* moved to set aside the verdict, but the Court concurred in the opinion of the *Lord C. J.* as expressed at the trial.

It is not to be concluded from this case that an insurer on a policy against fire is exempt from a loss occasioned thereby, on the ground that the servants of the assured have been careless or unskilful, and that the fire was occasioned by their negligence and misconduct. An insurer would un-

questionably be answerable in such a case. The spirit of the decision of the present case is this: that there was no loss by fire, by whatever cause or misconduct produced. The injury arose from the misdirection of heat, occasioned by the unskilful management of the machinery in the sugar house. It was not, therefore, in any fair and reasonable construction of the policy, one of those accidents against which the defendant had engaged to indemnify the plaintiffs.

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**A**CTION on a policy of insurance on the *Jonge Grief*, at and from *London* to her port of discharge in *Holland*, or the *Ems*. In the first count the interest was averred to be in the plaintiffs; and there were other counts averring it to be in one *Wiger Harmens*, who resided in *Holland*, and to whom, in fact, the vessel belonged. The loss was capture by a French privateer. The ship had been taken and the papers with it; the first license, therefore, was lost; but a second had been obtained, and was produced. It bore date the 5th *July*, 1810, and was granted to the vessel on the petition of the brokers, who had obtained the first license on a similar petition. The license was to the vessel to sail in ballast from *London* to *Holland*, &c. notwithstanding any thing contained in his Majesty's Order of Council of *April*, 1809. The petition, upon which the license was granted, was not produced.

A license granted to a ship to sail in ballast from *London* to *Holland* (which country was at that time in a state of hostility) notwithstanding any thing contained in his Majesty's Order of Council of *April* 1809, held not to protect a ship which was the property of an alien enemy. An insurance, therefore, on such vessel is void.

The *Solicitor General* and *Spankie*, for the defendant, objected; that this license did not protect a vessel owned by an alien enemy at that time resident in *Holland*. It might be desirable to license neutrals; but belligerents were differently circumstanced. In 1810, the coast of *Holland* was in a state of blockade; we were then at war with that country; the object of the license

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was to relieve the blockade: it did not, like other licenses, adopt the *Jonge Grief* as a British vessel for the time. In consequence of that license, which carries no evidence on the face of it that it is granted to a vessel owned by a Dutchman, the enemy seize the ship; they have the value by capture; and an alien enemy, the owner, claims likewise the value from the underwriters. The council thought the license granted to a neutral; and the license is only consistent, by being a license to this ship, provided she were a neutral.

*Vaughan and Taddy*, for the plaintiffs.—This was in effect a license to the vessel to return to *Holland* in ballast. It is clear that she had brought a cargo from *Holland* with a sufficient license; and she is here with the knowledge of Government. It is objected that it may be a license to protect enemy's property. Government might use the ship for that purpose, and extend the protection to property of any description. This is not a license for goods, but specifically to the ship; to a Dutch ship, and to a Dutch captain. It would be a fraud in Government to allow an enemy to import goods into this country, and not to permit the vessel to return in ballast. The King may grant such a license; and it is evident that the vessel was only returning in ballast after depositing her cargo in this country. They cited *Hagerdorn v. Reid*, 1 Maule and Selw. 567.

GIBBS, C. J.—I think this license was not sufficient to cover enemy's property: we were at war with *Holland*. The Order of Council of 1809 had

prohibited all vessels from sailing to any port within that district to which this vessel was bound. Some license was necessary. The King, receding from his belligerent rights, might grant a license to an alien enemy, and legalize the voyage; he might grant a license to the ship to proceed to the prohibited ports. The question is, whether the license protects the ship, being an enemy's property. If the object of this license were to protect an enemy's ship, and I could see this ship to be an enemy's property, it is sufficient. But if it be to protect her from the Order of Council, it is not sufficient. I can look only to the license: the petition we have not. In *Hagedorn v. Reid* the license was to import a cargo, though the insurance was on the ship; the license in that case included all flags, though the King's enemies, except a French flag. If I found that this was a license to brokers and neutral merchants to export a cargo to *Holland* in any vessel but a French vessel, I should say it extended to a Dutch vessel. Looking only to this license, which is granted for this ship to go back to *Holland* in ballast, and this being an insurance on the ship, I do not know how it can protect her as enemy's property. I cannot collect from the license a privilege to the persons who obtained it, to be interested in a ship belonging to an alien enemy. It is apparent that the object of this license was to remove the disability occasioned by the Order of Council.

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The *Solicitor General* and *Spankie*, for the defendant.

[Attornies, *Pearce* and Son.—*Crowder* and *Lavie*.]

Although the state of *Europe*, in which the late extensive system of licenses originated, has passed away, most probably never to return; yet, as in some future war, a condition of things may arise, requiring a partial application of the same system, it may not be useless to explain the principles, and to refer to the leading decisions, upon which the practice of granting and interpreting licenses was controlled and regulated.

The navigation laws, and more especially the celebrated act of 12 Chas. 2. c. 18. (the basis of our commercial system,) being the statutes of the realm, could not of course be dispensed with by the prerogative of the crown. But it has been found necessary on many occasions to have recourse to parliament to suspend their operation in time of war. Various acts therefore were passed, to alter or qualify them according to the new condition of things which was produced.

By these acts, a special power is given to the King in Council to modify or dispense with such provisions as might be found expedient in particular conjunctures. Under some of these statutes, licenses were directed to be granted by an Order in Council, &c.: under others, the Secretaries of State, by an authority under the King's sign manual, and in pursuance of an Order of Council specially authorizing the grant, were empowered to act in the place of the sovereign. The principal acts were, the 43 G. 3. c. 153. s. 15., 45 G. 3. c. 34., 46 G. 3. c. 111., 47 G. 3. c. 27., 48 G. 3. c. 37., 48 G. 3. c. 126., 49 G. 3. c. 25., 49 G. 3. c. 60. As the authority to grant these licenses was derived from the whole legislature, the power under them was consequently restricted to the letter and reasonable intendment of the several acts, and could not be extended farther than the statutes themselves permitted.

Independently of this power of bestowing licenses, by which the restrictions of the navigation law were dispensed with, the Crown, by its prerogative, already possessed a power of granting privileges and dispensations, by which it receded from its own rights in a state of war. Upon these conjoint legal powers, therefore, viz. the licenses by statute, which was an enlargement of the powers of the Crown by acts of parliament, and the licenses by prerogative, which were of inherent right, was built a system sufficiently large to accommodate itself to *Europe* under the *Milan* and *Berlin* decrees. Being granted for commercial purposes, they were not deemed to be *strictissimi juris*: they were not construed so tenaciously as the grants of the Crown in ordinary to the subject. Their object was to dis-embarrass commerce from the restrictions which the enemy had thrown upon it. The Crown, in these licenses, gave nothing but a more extensive liberty of trade and commerce; of importation and exportation. It no way diminished its own stock, whilst it consulted the interest of the revenue. Hence it became, though not indeed in the first instance, a practice of the Courts

of Admiralty, and likewise of the Courts of common law (in which such licenses came incidentally under their cognizance in questions of policies of insurance, freight, &c.) to interpret them liberally and largely, and with none of that jealous apprehension of the subject taking more than the Crown intended to give, by which royal grants had been fettered and controlled at common law.

It would be a want of due professional feeling, now that the subject presents itself, not to join the humble testimony of the writer of this note (with the concurrent praise of all) to the profound and accurate learning of Sir *William Scott*, who, in the administration of this law, has shewn how the most liberal equity can be reconciled with the requisite certainty of law. He is in fact the author of the whole learning of the law relating to the system of licenses. And if it be considered how suddenly and unexpectedly the circumstances arose, it must be matter of reasonable admiration, and of the most unqualified praise, that a connected set of principles, so consistent with law, and the practice of the Courts, was as immediately invented to meet and embrace them. It must remind the

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common lawyer of the celebrated fiction of *uses*, so ingeniously invented and introduced by the clergy to evade the statutes of *mortmain*. The law of licensing, a term and title already known to the Admiralty Courts, was thus extended to comprehend a new and unexpected state of things. A certain nature, suitable principles, and rules, were given to it; and most ingeniously, and at the same time most learnedly, they were made to accommodate themselves to all the cases which could occur. The limits of a note will only enable us to give a summary of the leading cases which have been decided upon this subject.

We have already observed, that the King, who is the arbiter of foreign commerce, may regulate it, except he be restrained by statutes; but he cannot change the law of the land, or the law of nations, by general and unlimited regulations.

He may give an enemy liberty to import; he may place a whole district, though the member of a hostile country, in a state of amity; he may exempt any individual from the operation of war. 1 Acton, 313.

But a license to an enemy to import goods must be ex-

press, for an enemy will not be protected by a general license. 1 Acton, 313.

In all cases, however, in which the King grants a license, he may also qualify it, in which case the parties seeking to protect themselves under it must conform to its regulations. 1 East, 475.

In the case of the *Cosmopolite*, 4 Rob. 11. Sir William Scott says, "a license is a high act of sovereignty: they are necessarily *stricti juris*, and must not be carried farther than the intention of the great authority which grants them may be supposed to extend. I do not say that they are to be construed with pedantic accuracy, or that every small deviation shall vitiate the fair effect of them."

Again that learned Judge observes, "the shipper obtains a license, which is a thing *stricti juris*, to be obtained by a fair and candid representation, and to be fairly pursued." 4 Rob. 96.

In this case, the *Cosmopolite*, Sir William Scott, proceeds to lay down certain rules for the obtaining and construction of licenses, which are most fit to be attended to. "Two circumstances," he says, "are required to give due effect to a license: 1st, that the intention

of the grantor shall be pursued; 2d, that there shall be an entire *bona fides* on the part of the user. It has been contended that the latter alone should be sufficient, and that a construction of the grant merely erroneous should not prejudice. This is, I think, laid down too loosely. It seems absolutely essential, that *that* only shall be done, which the grantor intended to permit: whatever he did not mean to permit is absolutely interdicted; and the party who uses the license engages not only for fair intention, but for an accurate interpretation and execution. I do not mean to exclude such a latitude as may be supposed to conform to the intentions of the grantor literally understood."


In the early cases upon licenses in the common law Courts, the inclination of the Judges was in favour of a liberal construction of them. Thus in *Defflis v. Parry*, 3 Bos. and Pul. 3., where a license was obtained by A. to import from an enemy's country, in six ships, such goods as should be specified in his bill of lading, and goods were imported on board one of the six ships on account of B., C., and D., to whom several bills of

spective goods, and one general bill of lading for the whole cargo was sent to A.; the Court of Common Pleas held the whole cargo to be protected. In this case Lord *Alvanley* observed, "we are not to construe the acts of Government strictly against the merchant. If it had been intended that the license should have been more confined, I think it would have been expressed."

In the case of the *Jonge Johannes*, which was a case precisely similar, 4 Rob. 263., Sir *William Scott* decided in direct opposition to the judgment of the Common Pleas, holding, that when a license is granted to one person it cannot be extended to the protection of all other persons who may be permitted by that person to take advantage of it. "The great principle," he says, "in these cases is, that subjects are not to trade with the enemy without the special permission of the Government; and a material object of controul which Government exercises over such trade is, that it may judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war." See likewise the case of the *Aurora*. 4 Rob. 218.

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In some subsequent cases, however, the Courts of common law adopted a more liberal construction. Thus, where a license was granted to A., on behalf of himself and other British merchants, to export goods to certain places within the influence of the enemy, which places were interdicted to British commerce, it was held sufficient to legalize an insurance upon such adventure, if it appeared that A. was the agent employed for the British merchants really interested in it, to get the license, though he had no property in the goods himself. *Rawlinson v. Janson*, 12 East, 225. *Sed vide Barlow v. M'Intosh*, 12 East, 311.

Where a license was granted to A. of *Birmingham*, for the importation of certain goods from *Holland* into this country, Sir *William Scott* decided that such license would not protect a shipment made by him in *Holland* in person, and under papers describing the firm of his house as A. and Co. of *Amsterdam*. *Jonge Kassina*, 5 Rob. 297. So a general license is to be construed strictly, and will not extend to the protection of enemy's property. The *Josephine*, 1 Acton, 313. But a license, particularly specifying *any flag*,

protects even enemy's property. 1 Acton, 332. So where a license was granted to a British merchant by name, on behalf of himself and others, to export to *Petersburgh*, and import a cargo thence, it was held, that an alien enemy might lawfully be interested in the export cargo, as well as in the import cargo. *Feize v. Bell*, 4 Taunt. 4. The decision in that case turned upon the general words of the license, which was to the grantee by name, on behalf of himself and others. The object was to facilitate the export of British goods, to effect which the goods must necessarily be consigned to foreigners. A different construction would obviously have impeded the commercial purposes for which the license was granted. So it has been holden by K. B. that a license to J. H. of *London* merchant, on behalf of himself and other British merchants, to import a cargo from certain limits, within which an enemy's port was situate, in any vessel bearing any flag *except* the French, would protect a ship trading from that port, in which ship J. H. and an alien enemy were jointly interested. *Hagedorn v. Reid*, 1 Maule and Selw. 567. The Court thought that the true

construction of that license was to protect a trade in any ship except one bearing the French flag.

*Sed vide Hagedorn v. Bazett*, 2 Maule and Selw. 100. *Menett v. Bonham*, 15 East, 477. *Flindt v. Crockatt*, *ibid.* 522. *Fenton v. Pearson*, 419. *Parkin v. Dick*, 11 East, 502. and the cases referred to in the argument in 2 Maule and Selw. 104.

A license to "sail under any flag except the French," was held to exclude French ownerships. *Edw. Adm. Cases*, 44. But a similar license was held to protect the property of persons in countries unexpectedly annexed to France, whilst engaged in British commerce. *ibid.* 45. But a vessel carrying a cargo to the ports of the enemy, under a license to proceed thither in ballast, for the purpose of bringing a cargo to this country, was held not to be protected. *ibid.* 11.

A license to import a cargo into this country, was deemed sufficient to protect a vessel proceeding in ballast to the port of shipment for that purpose. *ibid.* 34. Whenever a license is granted on a condition, that condition must be truly and faithfully performed. *Vandyck v. Whitmore*, 1 East, 486. See likewise a note of

*Gordon and Vaughan* annexed to the case of *Shiffner v. Gordon*, 12 East, 302.

Thus in the case of the *Europa*, where the condition of the license was, for the vessel to touch at *Leith*, and it was not complied with, Sir *William Scott* condemned the vessel. *Edw.* 32. And the sentence was affirmed on appeal. It is a violation of a license to touch at an interdicted port, under a license for a direct voyage to this country. The presumption being, that, at the intermediate port, the vessel might receive another destination, or might actually deliver her cargo in that port. *Edw.* 42. *Secus*, if it be not known to be such at the time of sailing, *ibid.* 40.

The words in a license, "to whomsoever the property may appear to belong," have been held to protect the property of an enemy. *ibid.* 20.

A license to sail under any flag except the French was not deemed to be vitiated by the owner becoming a French subject during the course of the transaction. *ibid.* 45.

So, in a case where permission has been given by a license to export a cargo, the original license is sufficient to protect the ship and cargo, not only *eundo*, but *redeundo*, where the

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original purpose has been defeated by the elements, or the arts of the enemy. Case of the *Jonge Frederick*, May 10, 1810.

A license granted subsequently to the date of the capture was held to be no protection. Case of the *St. Ivan*, *Wacklin*, Nov. 12, 1811.

In this case Sir *William Scott* observed, "a license is in its very nature prospective, pointing to something which has not yet been done, and cannot be done at all without such permission. Where the act has already been done, and requires to be upheld, it must be by an express confirmation of the act itself, as by an indemnity granted to the party; but a license necessarily looks to that which remains to be done, and can extend its influence only to future operations."

A license to import a cargo in one vessel was held to protect the importation of the same cargo in two vessels; and

from a different port, it being shewn that it was impossible to make the shipment at the port specified in the license. Case of the *Vrouw Camelia*. But a license to proceed to an enemy's port in ballast, for the purpose of bringing a cargo to this country, was held not to be a protection for a vessel carrying a cargo to the port of shipment. Case of the *Wol-farth*.

In cases in which the parties have used due diligence, but have been prevented by accidents not within their controul, from carrying their intentions into effect within the time, it has been holden that, though their licenses have expired, they are entitled to protection. The case of the *Goede Hoop*, Nov. 7, 1809. Edw. 1. This case is most important on account of the masterly judgment of Sir *William Scott*, who therein discusses the rules of interpretation to be applied to licenses generally.

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## GEVERS and Another v. MAINWARING.

**T**HIS was an action on the case. The declaration stated that the plaintiffs had employed the defendant as their agent, to purchase 129 bales of tobacco of the best quality, for a certain commission and reward, &c. : that in consideration thereof he undertook to conduct himself skilfully and diligently as an agent; but that, on the contrary, he purchased tobacco of a very inferior quality, and of no use to the plaintiffs; to their damage, &c. Plea: the general issue.

A broker is a witness to prove a contract; but in an action brought against the principal for negligence and misconduct in the course of his employment in the purchase of certain bales of tobacco, the broker, who made the contract for him, cannot be called to prove that there was no negligence or misconduct in the execution of it, without a release from his principal.

The plaintiffs having made out a case, the defendant's counsel called the broker employed in the purchase, for the purpose of proving that the tobacco was of the best quality.

The *Solicitor General* objected to his competency. He is liable to the defendant if he misconducted himself in his employ. If he acted contrary to the orders he received, he is responsible to his principal.

*Lens, contra.*—The necessity and convenience of commerce require that his testimony should be admitted. The expediency of the thing relaxes, in this case, the ordinary rules of law.

GIBBS, C. J.—A broker may be received to prove that a contract was made; but it is a dif-

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ferent case where the question is, whether the contract be properly executed. A sale may be proved by an agent from the necessity of trade; but in an action for the misconduct or negligence of a servant, such servant cannot be called to prove that there was no negligence. If the broker had no direction to purchase the best tobacco, you might call him to prove that he did purchase the best tobacco. But I reject him on the ground of his being called to prove that he was directed to purchase according to the contract, and that the tobacco was purchased in conformity with those directions.

The defendant refused to release the broker; and the principal question, which it was intended to raise in this action, was not therefore determined.

Verdict for the plaintiffs.

The *Solicitor General, Vaughan*, serjeant, and *Taddy* for the plaintiffs.

*Lens, Best*, and *Rough*, serjeants, for the defendant.

[Attornies, *Kaye and Co.*—*Bleasdale and Alexander.*]

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Vide *Green v. The New River Company*, 4 T. R. 689. Salk. 287. *The King v. Bray*, Cases, *tempore Hardw.* 358. *Miller v. Falconer*, 1 Camp. 3 Lev. 174.; and *Gilbert's* 251. *Martin v. Henrickson*, Law of Evidence, 122, &c. See likewise 15 East, 474. 2 Ld. Raymond, 1007. S. C.

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**D**EBT on an award; to which were added common counts for goods sold and delivered, &c. The defendants pleaded: 1. *Non est factum*. 2. That they did not covenant and agree, &c. 3. That they did not submit themselves, &c. There were other pleas, the substance of which was the same as the foregoing.

An authority to execute a deed must be by deed; and if one partner acknowledge that he gave another partner authority to execute a deed for him, the presumption is, that it was a legal authority, which must be under seal and produced. An acknowledgment is not sufficient.

The plaintiffs were merchants at *Petersburgh*; and some differences having arisen between them and the defendants, an agreement was entered into to submit to the award of Mr. *Ludlam*. The agreement, which was under seal, was executed by one of the defendants for *self and partner*. On the part of the plaintiffs, it was executed by an agent of the name of *Jonn*; but he had executed it in his own name, without stating that it was by procuration, or for the plaintiffs. A power of attorney had been given by the plaintiffs to *Jonn* to sign any instruments or documents relating to commercial affairs, in their names, either jointly or severally, or in the names of their attorney.

*Vaughan* and *Parke* objected to the execution. This deed may bind *Jonn*, but it cannot bind any other person. An attorney should execute in the name of his principal. The power of attorney is not sufficient: he must be connected with the



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deed by the deed itself; not by an instrument *dehors*.

His Lordship doubted whether it would be sufficient; but he called upon the plaintiffs to support the execution of the defendants "for self and partner." They proposed to prove that one of the *Eggintons* gave authority to the other to execute the deed for him; and that the partner, who did not execute, had subsequently acknowledged the agreement.

*Lens* and *Gaselee* contended that this was a substantial execution.

GIBBS, C. J.—The authority to execute must be by deed. If one partner, who does not execute, acknowledge that he gave an authority, I must presume that it was a legal authority; and that must be under seal and produced. One man cannot authorise another to execute a deed for him but by deed. No subsequent acknowledgment will do. The defendants have pleaded that it is not their deed.

The plaintiffs afterwards proceeded on the common counts, and recovered a verdict.

*Lens*, serjeant, and *Gaselee*, for plaintiffs.

*Vaughan* and *Parke*, for defendants.

[Attornies, *Grogons*—*Rosser* and Son.]

If A. execute a deed for himself and his partner, by the authority of his partner, and in his presence, it is a good execution, though only sealed once. *Ball v. Dunsterville*, 4 T. R. 313. In that case, the Court relied principally on the deed having been executed by one partner, for himself and the other, *in the presence of the other*. See *Lord Lovelace's case*, Sir W. Jones, 268. One partner cannot bind another by deed. *Harrison v. Jackson*, 7 T. R. 207. So, one who executes a deed for another under a power of attorney, must ex-

ecute it in the name of his principal. *Combe's case*, 9 Rep. 76. *Frontier v. Small*, 2 Ld. Raym. 1418. 1 Strange, 705. *White v. Cuyler*, 6 T. R. 176. But though the act done must be the act of the principal, and not of the attorney who is authorised to do it; yet, if the deed be executed in the principal's name, it matters not in what form of words such execution is denoted by the signature of the names; as if opposite the seal be written "for J. B. (the principal.) M. W. (the attorney) L. S." *Wilks v. Back*, 2 East, 142.

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FIRST SITTINGS IN HILARY TERM,  
56 GEO. III. 1816, AT WESTMINSTER.

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January 24.

POOLE v. SMITH.

In an action by the indorsee of a bill of exchange against the acceptor, it appeared that, after action brought and notice of trial, the bill, which was indorsed in blank, had been lost. Held, that although the bill had been drawn more than six years, the plaintiff was not entitled to recover without producing it at the trial.

**T**HIS was an action by the indorsee of a bill of exchange against the acceptor. The bill had been drawn more than six years, and the action was commenced in 1813. A few days previous to the trial, the bill, (which was indorsed in blank) had been picked out of the pocket of the attorney's clerk, and had not since been found. There was evidence that it had been shewn to the acceptor after the action was brought, who admitted the acceptance to be his hand-writing, but said he had no obligation to pay, inasmuch as between him and the drawer it had been satisfied by other bills.

The Chief Justice thought that this evidence was not enough without producing the bill.

*Best, serjeant.*—The plaintiff had a clear right of action : notice of trial was given : the bill had been drawn several years, and the statute of limitations can be pleaded to any action which may be henceforward brought upon it.

GIBBS, C. J.—Upon the ground of the non-production of the bill, I think I am called upon to nonsuit the plaintiff. The rule is an extremely salutary one, and ought not to be relaxed.

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This was an undefended cause.

*Best*, and *Marshall*, serjeants, and *C. Marshall*,  
for the plaintiff.

[Attorney, *Rowe*.]

In case a bill be lost, the finder may confer a title by transferring it; in the same manner if it be stolen. *Miller v. Race*, Burr. 452. So, in *Lawson v. Weston* it was decided, that the holder for value of a bill indorsed in blank by the payee, was entitled to recover against the acceptor, although the bill appeared to have been stolen from some prior holder, who immediately advertised his loss. 4 Esp. 56. But if the bill be not assignable otherwise than by indorsement, the finder cannot transfer a title. Where however it is transferable by mere delivery, and has been lost; or where, being transferable by indorsement, it has been lost after a blank indorsement, no

action can be brought upon it. And the offer of an indemnity will not render such action maintainable. See *Pierson v. Hutchinson*, 2 Camp. 211., in which Lord *Ellenborough* held, that an action at law could not be maintained against the acceptor of a bill of exchange which was lost, after being indorsed, although a bond of indemnity had been tendered to the defendant. In *ex parte Greenway*, 6 Vesey, 1812, Lord *Eldon*, C. said, "he could never understand by what authority Courts of law compelled parties to accept an indemnity."

Where a bill or note has been destroyed, or where it is transferable by indorsement, and has been lost before in-

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dorsement, or after a special indorsement only, an action may be maintained upon it, and secondary evidence admitted of its contents. *Long v. Bailie*, 2 Camp. 214. So, if after the acceptance of a bill, the acceptor improperly detain it in his hands, the drawer may nevertheless sue him on it, and give him notice to produce the bill, or on his default give parol evidence of it. *Smith v. McClure*, 5 East, 476.

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 SECOND SITTINGS AT WESTMINSTER.
 

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## HORSEFALL v. DAVY.


**T**HIS was an action on the 11 G. 2. c. 19., against the defendant, for assisting in the carrying away of certain goods to avoid the payment of rent.

The value of the goods as stated in the record was 20*l.*; and the statute provides, that where the value of the goods is less than 50*l.* a summary remedy may be obtained before two Justices of the peace.

*Best*, serjeant, for the defendant, insisted, that this clause obliged the plaintiff to have recourse to two Justices, and that he had no right to sue in a superior Court. The statute introduced a new law, and the penalty must be recovered in the form prescribed.

GIBBS, C. J.—Unless I am shewn a case, in which, after a general prohibition, and a general enactment of a penalty, and a remedy given to the party by a summary proceeding in the words of this statute, it has been holden that the Courts of Record have no jurisdiction, I shall permit

The fourth section of stat. 11 G. 2. c. 19. which, in the case of goods carried away to avoid payment of rent, gives a summary remedy before two Magistrates, provided the value of the goods shall not exceed 20*l.*, does not take away the jurisdiction of the King's superior Courts.

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the plaintiff to proceed. A power is given to the Magistrates, but not an exclusive power. I am of opinion that the fourth section of the act does not take away the jurisdiction of the Court given by the preceding.

Verdict for plaintiff.

*Lens*, serjeant, and *W. H. Maule*, for plaintiff.

*Best*, serjeant, and *Adolphus*, for defendant.

[Attorneys, *Geldart*———*Morley*.]

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SITTINGS IN HILARY TERM, 56 GEO. III.  
AT GUILDHALL.

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BONDRETT v. HENTIGG.

**P**OLICY of insurance on goods from *London* to the *Isle of France*, &c. Loss averred by perils of the sea. The plaintiff claimed a total loss. The ship had been wrecked; but some of her cargo was saved and got on shore. It fell however into the hands of the natives of the *Isle of France*, who destroyed part and plundered the rest.

Where, in a policy of insurance on goods the vessel is wrecked; part of the goods are lost, and part got on shore, but (whilst on shore) are destroyed and plundered by the inhabitants of the coast, so that no portion of them comes again into the possession of the assured. Held that this is a loss by perils of the sea, and no abandonment was necessary.

*Bosanquet*, serjeant, for the defendant.—This is not a loss by perils of the sea, and the plaintiff has not abandoned. To make it a total loss under these circumstances there must be an abandonment.

GIBBS, C. J.—An abandonment is not necessary to make it a total loss: the cause of the loss was the perils of the seas; and the portion of the goods which was saved from the wreck, though got on shore, never came again into the hands of the owners. It is therefore a total loss to them from the perils stated in the declaration.



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*Vaughan*, serjeant, and *Barnewell*, for plaintiff.

*Bosanquet*, serjeant, for defendant.

[Attornies, *Blunt* and *Bowman*———*Courteen* and *Robinson*.]

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*Dyson* v. *Rowcroft*, 3 B. 585. *Wilson* v. *R. E. Com-*  
and P. 474. *Manning* v. *pany*, 2 Camp. 623.  
*Newnham*, Marshall on Ins.

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THIRD SITTINGS IN HILARY TERM;  
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BADDELEY v. MORTLOCK and Wife.

February 13.

**A**CTION for a breach of promise of marriage. The plaintiff proved the promise; but it appeared that, after the promise, some charges had been made against the plaintiff, and communicated to the defendant's wife, then unmarried, imputing to him dishonesty in some pecuniary concerns, and likewise perjury. Being called upon to clear himself before the lady, he said he could explain the transaction, but did not go into any particular vindication. Upon which, as was alleged by the defendant's wife, the negotiation for marriage broke off. She had previously told the plaintiff that until he vindicated himself she would not marry him.

In an action against a woman for a breach of promise of marriage, it is a sufficient justification for non-performance, if the person, to whom she has given the promise, turn out upon inquiry to be a man of bad character; but mere accusation and suspicion are not sufficient. The charges, which she makes against him, must, if capable of proof, be substantiated; or they go only to the damages.

*Best, serjeant*, for the defendant, contended that she was justified in breaking off the match. The plaintiff was bound to clear his character to his intended wife; and having omitted to do so, he forfeited every right which he had gained by the previous promise.

GIBBS, C. J.—Having promised the plaintiff marriage, she must absolve herself upon some

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legal grounds. If a woman improvidently promise to marry a man, who turns out upon inquiry to be of bad character, she is not bound to perform her promise. But she must shew that the plaintiff is a man of bad character. The accusation is not enough. The facts charged were capable of proof. The existence of the rumour is not sufficient to discharge her from her promise. Without proof that the charges were founded, she is not absolved from her contract. But it affects the damages.

Verdict for plaintiff, damages one shilling.

*Lens*, and *Copley*, serjeants, and *W. P. Taunton*, for plaintiff.

*Best*, and *Vaughan*, serjeants, and *Adams*, for the defendants.

[Attorney, *Baddeley*.]

Where in an action for breach of promise of marriage, the defendant relies upon the general bad character of the plaintiff, a witness may be examined as to the representations made to him by third persons. *Foulkes v. Selway*, 3 Esp. per *Kenyon*, C. J.

Brutal or violent conduct,

as threats of ill usage, afford a legal excuse for breaking off an engagement. *Leeds v. Cooke et ux.* 4 Esp. 256. per *Ellenborough*, C. J.

And as to circumstances which justify a non-performance, see *Pothier Traité du Contrat de Mariage*, part 2. chap. 1. art. 7.

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SITTINGS AFTER HILARY TERM, 56 GEO. III.  
AT WESTMINSTER.

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MORRIS v. STACEY.

February 15.

**A**SSUMPSIT against the defendant for the price of some shoes. The circumstances were these. The defendant acted as an agent, and had ordered some shoes from the plaintiff, who was concerned for country manufacturers. The price of the shoes amounted to 913*l*. The defendant proposed to give bills for the shoes, drawn by one *Wallis* on *Bromley*, and indorsed by *R. Burns*. The plaintiff pressed him to indorse the bills; but he told him that he would not indorse them, but would give him a letter of guarantee, which would do as well. The letter was in these terms:—"December 24th.—I herewith hand your drafts drawn by Mr. *Wallis* and accepted by Mr. *Bromley*, and indorsed by *R. Burns*: and should the bills not be honoured when due, I promise to see that they do so."—Signed by the defendant.

A., an agent for some manufacturers, sells to B., who likewise acted as an agent, a quantity of shoes, and receives certain bills of exchange in payment. B. being pressed to indorse them, refuses, but writes a letter to A., in which he incloses the bills, and adds, "that should they not be honoured when due, he (B.) would see them paid." Held, that this was a sufficient agreement within the 4th section of the stat. of frauds, to bind B. to pay for the goods, in default of his principal.

*Lens*, and *Best*, serjeants, for the defendant, objected, that there was no consideration. *Wain* and *Warlters*, 5 East, 10. From the words of the letter it is evident that the goods were actually de-

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livered at the time of the guarantee. *Egerton v. Mathews*, 6 East, 307. From both these cases it appears, that the whole agreement must be in writing. *Stadt* and *Lill* may be cited, 9 East, 348; but there the consideration was included in the terms of the guarantee. If it had appeared that something was to be done subsequent to the signing the paper, it would have been sufficient, and within the case of *Stadt* and *Lill*. But here, every thing had been done before the agreement was signed.

GIBBS, C. J.—It is sufficient. It appears on the face of the letter, that, in consideration that the plaintiff would take the notes, the defendant would indemnify him. The consideration, therefore, is apparent. I do not think it necessary in this case to over-rule the decision in *Wain v. Warlters*; I consider this undertaking binding, notwithstanding that case.

*Vaughan*, serjeant, and *Reader*, for plaintiff.

*Lens*, and *Best*, serjeants, for defendant.

[Attornies, *Ellison* and ~~W~~———*Riley*.]

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The statute of Frauds 29 Car. 2. c. 3. s. 4. avoids any "special promise to answer for the debt of another, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith."

In *Wain v. Warlters*, 5 East, 10., the Court of K. B. determined, that by the word *agreement* must be understood the consideration for the promise, as well as the promise

itself. And therefore, where one promised in writing to pay the debt of a third person without stating on what consideration, it was holden, that parol evidence of the consideration was inadmissible; and, consequently, such promise appearing to be without consideration on the face of the written instrument, it was *nudum pactum*, and gave no cause of action.

The decision in this case has given rise to much discussion and serious doubts. It is argued on the one side, that the word *agreement* is strictly a legal term, importing the consent or contract of two or more parties, for a thing done, or to be done, and either expressing, or directly implying, the consideration for the promise made by the party who is to be charged by the contract. The clause of the act says, "that the promise shall be void, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged, &c." It is maintained, therefore, that the word *agreement* must here be taken in its legal sense; that is to say, not as a promise, which is the act but of one party, and therefore no contract, but as the express *mind*

of both; the one doing, or undertaking to do, (or having done) some act on his part, for which the other binds himself by an equivalent. The person to be charged for the debt of another is to be charged upon his *special* promise in writing; but, without a legal consideration to sustain it, such promise would be *nudum pactum*. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing.

The statute was drawn up by one of the most eminent of our Judges; one who fully understood the value of legal precision, and one who, in the use of a legal term, could scarcely have intended it in its vague and popular sense. It was a natural conclusion, therefore, that by agreement he intended a legal agreement, and that the act was passed by the Legislature in that sense. That the object of the act was twofold; in the first place, to guard against the wide temptation to fraud and perjury afforded in the facility of obliging solvent persons, by mere parol evidence of their promises, to pay the debts of others; and, secondly, as there was always a strong presumption, both in law and reason,

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against such parties having taken upon themselves the debts of others; so this presumption should be met by the strong proof of the actual writing of the party, and thus, that the party himself should be secured against surprise by the formalities of a deliberate act. That these purposes would be ill accomplished by requiring evidence only of the *writing* of the promise, separated from the consideration upon which such promise was grounded. The promise and the consideration were in fact one thing—a whole—an agreement. And how many cases might occur in which the promise was conditional and contingent; in which the equity of the promise, therefore, required the performance of the previous condition, and in which the conscience and justice of the case demanded the same proof; that is to say, proof of the same kind and degree of the performance of the condition, and of the obligation of the promise. But how was this equality given, if, whilst the promise was proved, by the mere evidence of the handwriting, the performance of the consideration, or previous condition, was to be proved by parol evidence.

To these arguments it may

perhaps be replied, that the object of the act certainly was twofold: that of guarding against the facility of fraud and perjury by shutting out parol evidence of contracts for others: and, secondly, that of protecting such parties against surprise, by requiring the formalities of the act of writing. But is not the act of writing the promise sufficient for both these objects? Is not the act of writing, being an act of deliberation, a sufficient legal presumption of an equivalent consideration; and is it necessary to equity or law for the statute to protect a party, who not loosely and orally, but by deliberate intention, and by writing, obliges himself to some act or service. The requiring the promise to be in writing accomplishes both purposes of the act. The promise, that is to say, the obligation of the third party, is thus exempted from being proved by any parol evidence. And the third party himself is equally guarded against surprise by being afforded the deliberation and interval of the act of writing. There is nothing in natural equity opposed to a *nudum pactum*. It is required only to be proved by stronger evidence, in order to meet, not its illegality, but its greater

Improbability: A person has a right to give and grant simply and absolutely, and therefore, with or without a consideration. It is consequently no objection to this construction of the act to say, that it would give efficacy to a *nudum pactum*; to a promise without a consideration, or at least an apparent consideration. If a party so deliberately express his purpose, the law will either infer that such was his purpose, or that a sufficient consideration exists, though it may not appear. The protection of the statute is in requiring the act of writing to substantiate the obligation. If this writing be produced, the act, having accomplished its purpose, requires no further testimony, and thereby the wide field for frauds and perjuries is closed. The act was passed to prevent those frauds and perjuries, and therefore required that the promise, upon which the reliance was had, should thereafter be produced in writing. The word *agreement*, as is known to every one, is a term, in common parlance, synonymous with promise, undertaking, engagement, &c. This is the word in the statute, and why might not the Legislature adopt and use it in its popular sense? Where any term of an

equivocal sense is contrary to the spirit of the act, or insufficient for it, it may be allowable to choose the more consistent meaning; but where the act is accomplished without it, this practice is dangerous.

It seems indeed to be totally a mistake of the nature of the obligation to require a consideration to appear in express writing with the promise. The promise itself, being an obligation to pay the debt of another, and accompanied, as it must be in its nature, by the forbearance of the creditor, includes a consideration in itself. The first and original consideration, upon which the equity of the debt is founded, has already passed, before the intervention of the surety; and the conscience of the debt, as relating to the surety, is sufficiently implied, 1st, in the deliberate act of the surety, taking it upon himself; and, 2d, in the implication, as contained in the very nature of the contract, that he has not done it without sufficient benefit to the debtor.

It is evident that the decision in *Wain v. Walkers*, turned upon the technical import of the word agreement; for in a subsequent case, *Egerton v. Mathews*, 6 East, 307, which arose upon the 17th

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section of the statute of Frauds, the Court of K. B. came to a different conclusion. It was determined in that case, that a memorandum signed by the defendants, whereby they agreed to give so much for goods, took the case out of the 17th section of the statute, though the memorandum was not signed by the seller; nor did it express any consideration for the defendant's promise, otherwise than by inference from their own obligation. It is worthy of remark, that the words used in the 17th section are, "note or memorandum in writing of the bargain, to be signed by the parties to be charged by such contract." In *ex parte Minet*, 14 Vesey, jun. 189, the Lord Chancellor (*Eldon*) expressed serious doubts of the propriety of the decision in *Wain v. Warlters*. "There is a variety of cases," says his Lordship, "directly contradicting the case in the Court of King's Bench; which is a most important case with reference to the consequences. For the undertaking of one man, for the debt of another, does not require a consideration moving between them." In a subsequent case, *ex parte Gardom*,

15 Vesey, jun. 286, his Lordship decided against the rule in *Wain v. Warlters*; holding, that a guarantee in writing to pay the debt of another, was sufficient without stating any consideration as between the creditor and the surety. His Lordship observed, "Until the case of *Wain v. Warlters* was cited, some time ago, I had always taken the law to be clear, that if a man *agreed* in writing to pay the debt of another, it was not necessary that the consideration should appear upon the face of the writing. That case has determined two points; first, that a consideration is necessary; secondly, that it must appear upon the writing."

It has been determined, however, that a guarantee in writing to pay for any goods which the vendor delivers to a third person is good, within the 4th section of the statute of Frauds, as containing a sufficient description of the *consideration* of the promise, (namely, the delivery of the goods when made) as of the promise itself. *Stadt v. Lill*, 9 Eas 348. See likewise the case *Lyon v. Lamb*, Fell. on Me Guarantees, 228. *Phillips v. Bateman*, 16 East, 370.

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## SHEW and Another v. THOMSON.

**T**HIS was an action of debt and detain by the assignees of one *Thomson* a bankrupt, to recover a sum of money from the defendant, the proceeds of an execution. The execution had been levied subsequent to the alleged act of bankruptcy. The case turned upon the point, whether an act of bankruptcy had been committed. The bankrupt had directed his servant to deny him to his creditors, if any of them should call whilst he was at dinner, or engaged in business. It appeared that a creditor of the name of *Shew* called one evening in the month of *June* ; the bankrupt saw him, but afterwards reprimanded his servant for introducing him, and told her, "that if any one should come whilst he was at dinner or engaged in business, she should deny him." At the time when *Shew* first called the bankrupt was not at dinner. A few days after *Shew* called about half past five in the evening. The bankrupt had not then risen up from dinner, and was denied by the servant.

A trader directs his servant "that if any one should come whilst he was at dinner or engaged in business, she should deny him." Held that such instructions did not amount to a direction for a general denial ; and therefore, although a creditor called and was denied, it was no act of bankruptcy.

*Best*, serjeant, for the plaintiffs contended, that it was for the Jury to say, whether this was not a denial to a creditor. Whether the being engaged in business, or at dinner, was not a pretence.

GIBBS, C. J.—Whether this be an act of bankruptcy depends upon the instructions which the servant received from her master. I conceive such

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instructions not to be a direction for a general denial. It is no act of bankruptcy.

Plaintiffs nonsuited.

*Best*, serjeant, and *Reader*, for plaintiff.

*Lens*, serjeant, and *E. Lawes*, for defendant.

[Attornies, *Wills*.———*Burgess*.]

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*Garrett v. Moule*, 5 T. R. last edition, where the cases  
 575. *Dudley v. Vaughan*, 1 on this subject are collected  
 Camp. 271. See likewise and methodised.  
*Cooke's Bankrupt Laws*, c. 4.

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SITTINGS AFTER HILARY TERM, 56 GEO. III.  
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HINDLE v. BELL and Another.

February 20.

**T**HIS was an action against the Sheriff of *London* for a false return to a writ of *fiery facias*. In *February* 1814, a gentleman of the name of *O'Brien* took the benefit of the Insolvent Debtors' Act, the 54 G. 3. The plaintiff afterwards sued him, obtained a judgment, and execution was issued in *Michaelmas* term 1815. Mr. *O'Brien* then lived in *Craven-street*, where he had resided before his discharge. Goods to the value of 1,500*l.* had been seized on the premises; and the sheriff was indemnified for his return of *nulla bona*.

Where a debtor is discharged under an Insolvent Act, his property is vested in the Clerk of the Peace, until assignees are chosen, and afterwards in his assignees; and although he be permitted to continue in the possession of his property, and to act as ostensible owner, no creditor can take his goods in execution, and compel the sheriff to make a sale. His remedy is to obtain a distribution under the act, or, in a case of fraud, to apply to have the discharge set aside.

When Mr. *O'Brien* was discharged, no assignment had been made to any one under the act; but it appeared that his creditors, with the exception of *Hindle*, suffered him to remain in his house, and to occupy it with the usual furniture. An inventory of the goods taken under the execution was produced, together with a schedule, which Mr. *O'Brien* exhibited at the time of his discharge, containing an account and valuation of the furniture, a copy of which had been sent to the plaintiff as a de-

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taining creditor. Mr. *O'Brien*, subsequent to his discharge, had redeemed some plate which he had previously pawned, and had laid down some new carpets in his rooms; there was likewise a few coals in the cellar. The value of the plate and additional furniture, which was not included in the inventory exhibited at the Court of Insolvent Debtors, was about 100*l*.

*Lens*, serjeant, for the defendants.—The plaintiff has mistaken the law and the action. He had no right to seize these goods in execution. All Mr. *O'Brien's* property upon his discharge was vested, first in the Clerk of the Peace; then in the assignees to be appointed under the act. Suppose he had a hundred creditors wishing to deal mildly with him, and to leave him in possession of his goods, and one creditor not so inclined; his remedy is to oblige a sale: he cannot take possession under an execution, and pay himself his whole debt.

GIBBS, C. J.—The plaintiff had no right to take such property as belonged to Mr. *O'Brien* at the time of his discharge. It was vested in the Clerk of the Peace; he might have compelled the appointment of an assignee, and have obtained a distribution; but he could not take these goods in execution, unless fraud of a gross kind were shewn; and, even then, I am inclined to think that the regular course would be, to apply to set aside the discharge. But the sheriff is bound to seize the newly acquired property, and is answerable to the extent of such new property as can be ascertained.

With respect to the plate which was pawned, the creditors had only a right to it subject to the lien of the pawnbroker. If Mr. *O'Brien* has redeemed it, he stands in the place of the pawnbroker; and the money which he acquired to redeem it was subsequently acquired property. He became entitled to the possession of it; but the assignee under the Insolvent Act could only have it subject to the pledge. The sheriff, therefore, might have seized Mr. *O'Brien's* interest in it. For the coals, the carpets, and the interest in the plate, the plaintiff is entitled to recover.

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The Jury found a verdict for the plaintiff, damages 44*l.*

The *Solicitor General*, *Best*, and *Vaughan*, serjeants, and *Espinasse*, for the plaintiff.

*Lens*, and *Onslow*, serjeants, *Bolland* and *Spankie*, for defendants.

[Attornies, *Hill*. ——— *Palmer*.]

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February 23.

THORNTON and Others v. SIMPSON and Others.

A. contracts to sell to B. 50 tons of hemp, to be shipped from *Cronstadt*, or *St. Petersburg*; the ship's name to be declared as soon as known, and to arrive before the 31st of *December*. On the 5th of *September* A. gives notice to B. that the hemp was shipped on board the *Liveley*; on the 20th he sends a second notice, that if the quantity did not come by the *Liveley*, he would make it up from the cargo of another vessel. On the 29th A. gives a third notice, that 20 tons would come by the *Liveley*, and the rest by another ship. B. accepts the 20 tons, but refuses to receive any more. Held that B. was bound to receive the remainder of the hemp, unless he could shew that he had sustained some special damage by A.'s non-performance of the precise terms of the contract.

THIS was an action on a contract, dated the 5th *April*, 1815, for the delivery of 50 tons of Russian hemp, to be shipped from *Cronstadt* or *St. Petersburg*, in *June* or *July*, O. S. The ship's name to be declared as soon as known, and to arrive before the 31st of *December*, or the contract to be void. Sixty-four tons came by a vessel called the *Liveley*, which arrived first; and forty-four tons, part of the sixty-four, were delivered by plaintiffs under former and distinct contracts with other persons. Twenty tons were offered to the defendant, and accepted; and the residue of the fifty tons which had been collected at *St. Petersburg* by the shippers for the *Liveley*, were sent by the *Paragon*, the former ship having no room for them. On the 5th of *September* plaintiffs gave notice that the hemp was shipped on board the *Liveley*. On the 20th they sent a second notice, stating, that if the quantity did not come by the *Liveley*, they reserved to themselves the right of making it up by the *Unity* or *Paragon*. On the 29th of *September* they gave a third notice, that twenty tons would be shipped by the *Liveley*, and thirty by the *Paragon*. The defendants said they were willing to accept the twenty tons by the *Liveley*, but did not conceive themselves bound to receive any part of the hemp by another vessel.

The three ships arrived within a few days of each other.

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*Lens*, serjeant, for the defendants, contended, that the plaintiffs had not fulfilled the contract on their part. A great inconvenience arose from the hemp not coming by one ship. The necessity of insuring the goods in several vessels increased the expense. If the whole of the hemp contracted for came together, the purchaser might effect a better sale. The plaintiffs ought at least to have delivered all that came by the *Liveley*: though the defendants had received twenty tons, they did not consider themselves bound to take the hemp by piecemeal.

GIBBS, C. J.—If the defendants were not bound to take the whole of the hemp, they were not obliged to take part. They stand on three points: 1st, that they were not bound by the contract to receive one part by one ship and one part by another. 2d, that the plaintiffs are concluded by their notice, that the hemp would come by the *Liveley*. 3d, that they should have delivered all the hemp which came by the *Liveley*. I am of opinion the plaintiffs might call upon the defendants to receive what came between *July* and *December*: this was the substantial part of the contract. If, however, the defendants could shew that they had sustained any loss by the plaintiffs' non-performance, the contract would be discharged; but as it does not appear that they were injured, and might as well have received the hemp by one ship as by another, the plaintiffs have not



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forfeited the benefit of their contract by varying their first notice. As to the last point, they were not bound to deliver the whole of the cargo of the *Liveley*, because they were not bound to deliver the whole by one ship.

Verdict for plaintiffs.

*Best*, serjeant, and *Marryat*, for the plaintiffs.

*Lens*, and *Blossett*, serjeants, for defendants.

An agreement whereby the defendants sell to the plaintiff a certain quantity of goods expected by a particular vessel, *on arrival*, is a conditional contract, dependent on the arrival of the goods. No action will therefore lie for the non-delivery of the goods on the arrival of the vessel in ballast. *Hawes v. Humble*, 2 Camp. 327.; consequently the statement of such an agreement as an undertaking to sell on the arrival of the vessel is a fatal misdescription of the contract. *Boyd v. Siffkin*, 2 Campb. 326. per *Ellenborough*, C. J.

Where defendants sold to the plaintiffs all the hemp, not exceeding 300 tons, which might be loaded in a certain vessel by the agent of the concern, who shipped only 71 tons for defendants, and filled up the vessel on the account of other correspondents; it was holden that the defendants were not liable for the non-delivery of the 300 tons. *Hayward and Others v. Scougall and Others*, 2 Campb. 56. per *Ellenborough*, C. J. See likewise *Waddington v. Oliver*, 2 N. Rep. 61.; and *Atkinson v. Ritchie*, 10 East, 530.

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LEVY v. COSTERTON.

February 24.

**C**OVENANT on a charter-party for affreightment, in which the defendant covenanted, *inter alia*, that the vessel, let to freight, "should be tight, staunch, and strong, and sufficiently furnished with every thing necessary and needful for the voyage in question," which was to *Cagliari* in *Sardinia*. The breach assigned was, "that the vessel was not well and sufficiently furnished with every thing necessary and needful for such a ship and voyage;" alleging that the ship sailed on her voyage without a document or bill of health, which the plaintiff averred to be a necessary document for the ship and voyage in question. The declaration then alleged that, from the want of this document, the ship was prohibited from entering the port of *Cagliari*; and that she was compelled to perform a longer quarantine than would have been requisite, if she had been furnished with the necessary documents. The declaration likewise alleged a loss on the sale of the cargo from the delay occasioned by the want of the bill of health.

In an action of covenant on a charter-party, in which the defendant covenanted "that the vessel should be sufficiently furnished with every thing necessary and needful for the voyage in question," which was to *Cagliari* in *Sardinia*: Held, that it was her duty to have a bill of health on board; and the plaintiff having been put to great inconvenience and expence on account of the ship not being provided with such document, that the defendant was responsible for the loss occasioned thereby.

The defendant had put several pleas upon the record: the substance of them was, 1. That the vessel was supplied with every thing necessary and needful for the voyage. 2. That a bill of health was not necessary for the voyage to *Cagliari*.

CASES AT NISI PRIUS, C. P.

The ship's name was the *Samuel*; she had been chartered by the plaintiff with a cargo of iron for ~~the~~ and was to bring back oil, &c. She sailed out of the port of *London* on the 7th of ~~September~~, and arrived at *Cagliari* in *October*, under convoy of the *Cossack*, one of the King's ships. The plague was then at *Malta*, and a general alarm prevailed at *Cagliari*. On her arrival, an application was made to the Board of Health for her admission into the port; but the Board refused, alleging that she had not produced a bill of health. In consequence of this refusal the *Samuel* sailed back to *Palermo* to join the *Cossack*; but she was not suffered to have any communication with the port. After some time a certificate was obtained from the Captain of the *Cossack*, but this document was not deemed sufficient at *Cagliari* without the verification of the Captain's signature, which had been forgotten. At last an officer was found in *Cagliari* who verified it. The ship, by these several obstacles, was delayed till the 29th of *November*, when she was received, and remained in quarantine till the 14th of *January*, 1814. Iron had fallen in price during her detention: the plaintiff had been obliged to insure for the voyage to *Palermo*, and great difficulty and delay were occasioned in taking in her homeward cargo. A sum had been allowed from the freight to cover the extra insurance, and the plaintiff sought to recover the difference between the value of the iron when the ship arrived at *Cagliari*, and the price for which it ultimately sold.

It was in evidence that a bill of health was

always required at *Cagliari* from whatever port the ship came: that if the *Samuel* had produced a bill of health she would have been admitted in five or six days, and that she might have delivered her cargo, and left *Cagliari* in a fortnight. A clerk of the Custom-house proved that it was usual to issue bills of health to vessels bound for the Mediterranean, and that they were never refused for *Cagliari*: that vessels might clear out without bills of health, and that they were never granted without application. It appeared, however, that the practice of granting these documents had been suspended at the Custom-house from the month of *November* 1813 to *February* 1814; and the reason assigned was, that the Commissioners had been advised to direct application for them to be made to the foreign Consuls.

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*Best*, serjeant, for the defendant, contended, that this was not a document which a ship was bound to take: for four months the Custom-house had refused to grant bills of health. A captain might take such documents by way of precaution; but they were not necessary, and formed no part of the law of nations. The plaintiff must make out the affirmative: that such a paper was needful and necessary. The ship was furnished with every thing necessary and needful within the fair intendment of the words of the defendant's covenant. But the covenant did not extend to a paper of this description: it did not comprehend any papers or documents: it had relation only to the ship and her necessary equipments. Questions had often arisen whether a ship was properly documented as a neutral;

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but the question, in the present case, is not whether this paper was necessary as a document required by the law of this country or the law of nations; (which he contended it was not) but whether it was within the meaning of this particular covenant.

*Lens, serjeant, contra.*

GIBBS, C. J.—In point of fact great delay has been occasioned, and the question is, whether the defendant is responsible for it, from his neglect to provide the vessel with a bill of health. He contends that he is not answerable under this charter-party: that a bill of health is not within the terms of it: that the words do not apply to ships' papers, nor do they require this document to be on board. The words "needful and necessary for the voyage," oblige the defendant to have every paper which was required to advance or facilitate the object of the voyage. The question is, whether a bill of health was necessary to enable the ship to enter *Cagliari*. If necessary to enable her to perform the voyage, the defendant was bound to provide it by the terms of his covenant. The ship was excluded because she wanted this document, and the law of *Cagliari* was well known upon this subject. The Custom-house had probably suspended the granting of these documents, because it was conceived that a substitute, more satisfactory abroad than a bill of health, might be obtained from the foreign Consuls. It is contended, however, that the words "necessary and needful," as far as they may be supposed to include ships' papers, apply only to documents required by the laws of

this country or the law of nations. But this is not the meaning of the covenant in the charter party: the words bind the owner to furnish the ship with every document necessary to the performance of the voyage; and as the ship was excluded from *Cagliari* on account of her not being provided with a bill of health, I am of opinion that the defendant is responsible.

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Verdict for plaintiff.

The damages were referred.

*Lens*, and *Copley*, serjeants, and *C. Warren*, for the plaintiff.

*Best*, serjeant, and ——— for defendant.

[Attorneys, *Wadeson* and Co. ——— *Nelson*.]

1816.

## CUMMING v. ROZBUCK.

An uncerti-  
ficated bank-  
rupt may sue  
as a trustee for  
his assignees;  
and he cannot  
object to the  
action unless  
they interpose.  
If a broker de-  
liver a bought  
and sold note  
which mate-  
rially differ,  
there is no  
valid contract.

**T**HIS was an action for not taking some coffee sold by the plaintiff to the defendant. On the 25th June, 1814, the plaintiff bought, through his broker, at the East India sales, 140 bags of coffee at 92s. per cwt.: the deposit was paid, and the broker received the warrants for delivery. On the 2d of October the plaintiff resold 120 bags at 84s. to the defendant.

*Lens*, serjeant, for the defendant, objected, that at the time of the sale the plaintiff was an uncertificated bankrupt; he had subsequently obtained his certificate. The parties are not on an equal footing. If the defendant fail to execute his contract, the assignees may interpose and sue him: he is a solvent person, and may be made to pay damages, but the defendant has only a nominal remedy against the plaintiff. The contract, therefore, was not valid for want of mutuality. This is not like the case of *Webb v. Fox*, 7 T. R. 391. That was trover for goods acquired by an uncertificated bankrupt since his bankruptcy; and the action was brought against a stranger. The Court held that the bankrupt had a title against all the world but his assigness. This is a very different case. In *Webb v. Fox* a tort was committed by a stranger who could have no right: here, the defendant has been entrapped into a contract with a man, against

whom, in case of non-performance, he has no effectual redress.

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GIBBS, C. J.—Unless the assignees interpose the bankrupt may maintain the action. He may sue as their trustee. You did not apply to the assignees to know whether or not they would adopt the contract; but, the property being at a loss in the market, you now make the objection for the first time—

In the sequel of this case it appeared that the bought and sold note differed; upon which an objection was taken by the defendant's counsel—

GIBBS, C. J.—If the broker deliver a different note of the contract to each party contracting, there is no valid contract. There is, I believe, a case which states the entry in the broker's book to be the original contract, but it has been since contradicted. Each is bound by the note which the broker delivers; and if different notes are given to the parties, neither can understand the other.

Plaintiff nonsuited.

The *Solicitor General* and *Campbell*, for the plaintiff.

*Lens*, and *Best*, serjeants, for the defendant.

[Attornies, *Pope*. ——— *Shaw*.]



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Vide *Chippendale v. Tomlinson*, Cook's Bankrupt Laws, 518. *Silk v. Osborn*, 1 Esp. N. P. 140. *Webb v. Fox*, 7 T. R. 391. *Webb v. Ward*, 7 T. R. 296. *Ex parte Proudfoot*, 1 Atk. 253. But it is a good plea to an action on a promissory note, and money had and received, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff; and it is no good replication, that the cause of action accrued after the plaintiff became bankrupt, and that the Commissioners had not made any new assignment of the note and money. For the assignment passes to the bankrupt's assignees all his after-acquired, as well as present personal property and debts. *Küchen v. Bartsch*, 7 East's R. 53. If the assignees of a bankrupt manufacturer employ him in carrying on the manufacture for the benefit of the estate, and pay him money from time to time, this is evidence of such a contract between him and his assignees, as will enable him to recover from them a reasonable compensation for his work and labour. *Coles v. Barrow*, 4 Taunt. 75.

The Courts of equity, concurring in the common law doctrine, have not shewn any disposition to extend it. They are averse to interpose against the claims of assignees in favour of creditors, whose debts have been incurred in the due course of subsequent trading by an uncertificated bankrupt. *Everett v. Backhouse*, 10 Vesey, jun. 94. *Ex parte Storks*, 3 Vesey and Beames, 105. Bankruptcy does not discharge the bankrupt's contract to purchase. *Brooke v. Hewitt*, 3 Vesey, jun. 255.; and the assignees have a right to file a bill for a specific performance of the contract. In 16 Vesey, jun. 474, the Lord Chancellor observed upon the inconsistency of divesting the bankrupt of all his rights of property, and yet retaining in him his rights of action; that they could not be reconciled, but were settled points which it was too late to disturb.


As to the entry in the broker's book, and alterations in the bought and sold notes, vide *Heyman v. Neale*, 2 Camp. 337.; *Powell v. Divett*, 15 East, 29.; and *Roxe v. Osborne*, 1 Stark, N. P. 140.

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## WARNER and Another v. BARBER.

**T**HIS was an action of trover brought by the assignees of one *Pellowe* a bankrupt, and the only question was, whether *Pellowe* had committed an act of bankruptcy. It appeared that the bankrupt and one *Toy* were in business at *Falmouth*; *Toy* was at this time at *St. Jean de Luz* for the purpose of disposing of some goods, and *Pellowe* was carrying on trade at *Falmouth*. In April 1814, he expressed to a witness his apprehensions that he should not be able to meet certain bills which were becoming due; that *Toy* had disappointed him of remittances to provide for those bills, and that he should be obliged to leave *England*, and to go to *St. Jean de Luz* to obtain effects. He left *Falmouth* by the packet on the 24th of April, 1814. It was publicly known that *Pellowe* was about to sail three weeks before he went: he stated in the news-room that he was going abroad. Some letters were produced from the bankrupt, in which he expressed a fear of being seen openly in the town lest he should be arrested; and a correspondence between *Pellowe* and *Toy* was read. In one letter *Pellowe* declares his inability to provide for the bills becoming due, and adds, "I fully intend coming out; I know not that I was ever so uneasy in my life; I cannot stop here whilst so many bills are becoming due every day. I am afraid of being arrested." He had likewise expressed his fear of being arrested to a

A trader, having business both in *England* and in *Spain*, has a right to go to the latter country to look after his concerns, and though his creditors are thereby delayed, it is no act of bankruptcy. But if he likewise goes abroad from the fear of arrest, though it concur with the justifiable motive, that of looking after his foreign business, it is an act of bankruptcy.


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sister of his partner. In his absence his business was transacted as usual, and his house kept open.

*Lens*, serjeant, for the defendant, contended, that the evidence in support of the act of bankruptcy was not sufficient. *Pellowe* goes to the place where his partner was residing for the purpose of procuring effects. A man who has business to transact in *England* and abroad, may go to the country where his property is, though he thereby withdraws his person, and occasions delay to his creditors in *England*. He complains that his partner does not make him remittances. He has business in *England* and likewise in *Spain*. Surely he may go to *Spain*. It is enough if he leave the country for the purpose of collecting his debts, and not with the view of delaying his creditors.

GIBBS, C. J.—That *Pellowe* withdrew himself from such creditors as were disposed to arrest him is clear from the fact: the question is, was the going abroad an act of bankruptcy? It is undeniable in this case that *Pellowe's* creditors were delayed. But if there be no intent to delay, the circumstance of departing from the realm, whereby delay is occasioned, is no act of bankruptcy. *Pellowe* had a right to go abroad to look after his property. If he went abroad from this motive, though delay was a consequence, yet if not intended, it is no act of bankruptcy; but if he went abroad from the other cause, the fear of arrest, though it concurred with the first and justifiable motive, that of bringing *Toby* to account, I am of opinion that it is an act of bankruptcy.

His Lordship left it to the Jury, to say, whether *Pellowe* went abroad for fear of arrest, and they found that he went abroad for both purposes.

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Verdict for plaintiffs.


The *Solicitor General*, *Vaughan*, serjeant, and *Puller*, for plaintiffs.

*Lens*, and *Best*, serjeants, and *Campbell*, for defendant.

[Attornies, *Lowless* and Co.———*Blunt* and B.]

In some of the early cases it was held, that if a trader depart the realm, and his creditors are thereby delayed, though there was no intent to delay, it was notwithstanding an act of bankruptcy. *Raikes v. Porean*, Cooke's Bankrupt Laws, 73. *Vernon v. Hankey*, *ibid.* In *Fowler v. Padget*, 7 T. R. 509., this rule was restrained, and three of the Judges were of opinion in that case that 'or' in the statute should be read 'and;' and that there must not only be a departure and a delay, but an intent to delay. It was argued that bankruptcy was a crime, and it is a principle of natural justice, that *actus non facit reum nisi mens sit rea*.

The intent, and the act, therefore, must both concur to constitute the crime. But in a later case K. B. decided, that the departure of a creditor from his house with an *intent* to delay his creditors, was an act of bankruptcy, though no creditor was in fact delayed. *Robertson v. Liddell*, 9 East, 487. See likewise *Holroyd v. Gwynne*, 2 Taunt. 176. *William v. Nunn*, 1 Taunt. 270. and *Chenoweth v. Hay*, 1 Maule and Selw. 676. From these cases it appears, that the construction which obtained in *Fowler v. Padget* is not a sound one; that it is unnecessary to change the words in the statute of *James*:—that the *intent*, and not the actual de-

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lay, was what the statute meant; and that, the moment the intent is ascertained, it becomes immaterial whether there was a possibility of delay or not. See likewise *Windham v. Paterson*, 1 Stark, N. P. 144.

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**TALVER and Another v. WEST.**

The delivery of a sample, which is no part of the thing sold, will not take a sale out of the statute of frauds, but if the sample be delivered as part of the bulk, it then binds the contract.

**T**HIS was an action to recover the price of some trefoil sold by plaintiffs to defendant: the invoice delivered to the defendant was as follows, 'Bought of *Talver and Prestwich* the half quantity of 400 sacks of trefoil, to be made up to 27 ton, at 10*l.* per ton.' On the other side credit was given for some hops sold by the defendant to the plaintiffs, and a balance stated to be due to them of 208*l.* The hops were taken in part payment of the trefoil, which remained in the plaintiffs' warehouse; no sample or delivery was made of any part, and no money was paid; but the invoice had been delivered to the defendant, who read it at the time of the sale. Some months after, the defendant came to the warehouse and asked for his seed; it was at that time set apart for him in the store, but had no particular mark to denote to whom it belonged. Defendant took samples of it, and inquired if it had not been thrown down and mixed; he finally refused it.

*Vaughan*, serjeant, for the defendant, objected,

that there was no part-delivery or earnest. Some of the trefoil was set apart in the plaintiffs' warehouse; but no name was put on the sacks to designate them. The sale therefore was void by the statute of frauds.

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*Best*, serjeant, for the plaintiffs, contended, that there was a part payment by the delivery of the hops, which would take it out of the statute of frauds. The defendant, moreover, takes samples, and, twelvemonths after the contract, comes to the warehouse to demand *his* seed, which is there set apart for delivery.

*GIBBS*, C. J.—If the trefoil were sold, to be paid for in part by the delivery of the hops, the plaintiffs should have declared specially, and not for goods sold and delivered; but I consider this case not within the statute. The delivery of a sample, which is no part of the commodity, will not take the case out of the statute; but if the sample delivered is to be considered as part of the thing sold, it then binds the contract. It is then an execution of the bargain. The sale in this case was complete when the invoice was delivered and the defendant afterwards took samples. He took them for his own use; they were delivered to him as part of the bulk; not as an ordinary sample to guide his judgment previous to a purchase; but in order to give him possession of the thing itself. The statute therefore does not apply.

Verdict for plaintiff.

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*Best*, serjeant, and *Comyn*, for plaintiffs.

*Vaughan*, and *Copley*, serjeants, for defendant.

[Attornies, *Cluton* and C.———*Meyrick* and B.]

Where goods are ponderous, and incapable of being handed over from one to another, there needs not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of a key of the warehouse in which the goods are lodged, or by the delivery of other *indicia* of property. So if the purchaser deal

with the commodity as if it were in his actual possession, this will supersede the necessity of proving actual delivery. *Chaplin v. Rogers*, 1 East, 192. See likewise *Kent v. Huskinson*, 3 B. and P. 233. *Hinde v. Whitehouse*, 7 East, 558. *Anderson v. Scott*, 1 Camp. 235.

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## MILN v. PREST and Another.

**A**CTION on a bill of exchange, drawn on the 10th of *August*, 1815, by *Wilson* in favour of *Smart*, and indorsed to the plaintiff. The question was, whether under the circumstances of the case, the act of the defendant was equivalent to a legal acceptance. The drawer, who resided at *Dundee*, was agent for the defendants, and had consigned some wheat to them. He had been employed to purchase corn, and the present bill was given in payment for the wheat. Some letters of the defendants were read, in one of which (9th *August*, 1815,) they write to *Wilson*, "We acquit you of buying wheat instead of oats—we will however accept the bills for the wheat when we receive notice of its being shipped." On the 14th, *Wilson* wrote to the defendants, and inclosed an invoice of the wheat which was then on the voyage, and requested the defendants to honour the bill which he had drawn. On the 16th, a clerk took the bill to *Prest* and Sons to be accepted, and left it. On the next morning he called, and was told the defendants had no advice, and was requested to call again. On the 18th he called for the last time, and was told that the bill would not be accepted until the wheat arrived. Shortly afterwards the wheat arrived, which the defendants accepted and sold.

A promise by letter to accept a non-existing bill is no acceptance of a bill when drawn, unless it be communicated to the person who is to receive the bill, and who is thereby induced to take it.

An acceptance is as valid by parole as by writing, and a conditional acceptance is as effectual as an absolute one, if the condition be complied with.

*Vaughan*, for defendants.—The bill is drawn the



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10th of *August*: defendants' letter is dated the 9th. The bill was not at that time in existence. No promise to accept a bill not in existence will bind a party. The doctrine of implied acceptance has been carried to the utmost verge of the law, and ought not to be extended. He cited *Johnson v. Collings*, 1 East, 98.

GIBBS, C. J.—I shall never extend it. You are within that case, unless they shew that the letter was communicated to the plaintiff, and that he received the bill with a knowledge. A promise to accept, not communicated to the person who takes the bill, does not amount to an acceptance. But if a person be thereby induced to take a bill, he gains a right, equivalent to an actual acceptance, against the party who has given the promise to accept.

It was then proved that the letter had been communicated to the plaintiff.

*Vaughan*, serjeant, next objected; that the evidence did not amount to an acceptance. The import of the answer in the defendants' counting-house is: We will not accept till the corn arrives; come to us then. They propose a condition which the plaintiff does not comply with.

GIBBS, C. J.—An acceptance may be as effectual by parole as by writing; a conditional acceptance is as valid as an express one, if the condition be satisfied. The wheat arrived; the defendants receive and sell it. This is the precise case of *Pier-*

*son v. Dunlop.* I am of opinion that what the defendants have done is equivalent to an acceptance.

Verdict for plaintiff.

*Best*, serjeant, and *Campbell*, for plaintiff.

*Vaughan*, and *Copley*, serjeant, for defendants.

[Attornies, *Swain* and Co. ——— *Mayne*.]

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Vide *Pillans v. Van Mierop*, Barr. 1663. *Pierson v. Dunlop*, Cowp. 571. *Mason v. Hunt*, Douglas, 284—297.

A promise to accept, made upon an executory consideration, is not binding, so long as such consideration remains executory, unless it influence some person to take or retain the bill. See *antea Pillans v. Van Mierop*. A promise in a letter that a bill shall meet with due honour, or that the writer will accept or certainly pay it, is an acceptance. Vide *Clarke v. Cock*, 4 East, 57. and *Wynne v. Raikes*, 5 East, 514. Although the letter be not received until after the bill has become due; and although no person has been induced by such promise to take the bill: so a verbal promise to accept, though the party expressly defer a written acceptance, as

where he says, leave the bill and I will accept it, is a complete acceptance. So a verbal promise to accept a returned bill when it shall come back is binding, if it do not come back: Vide *D. Molloy*, b. 2. c. 10. s. 20. Mar. 2d. ed. 17. and *Cox v. Colman*, M. 6 Geo. 2. cited arguendo Ann. 75. An answer by the drawee when a bill is called for, "there is your bill, it is all right," is no acceptance. Vide *Powell v. Jones*, Espinasse, 17. It seems that the drawee's keeping a bill presented to him for acceptance, may amount to an acceptance. Vide *Harvey v. Martin*, K. B. M. T. 1806. But by the usage of trade, a banker in London will not render himself responsible by retaining a check drawn on him, provided he return it any time before five o'clock in the

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evening, of the day on which it is drawn. Vide *Fernandey v. Glynn*, 1 Campb. N. P. C. 426. An acceptance to pay when remitted for, is a conditional acceptance. Vide *Banbury v. Lissett*, Str. 1211. So an answer by a drawee who lived in *London*, that a ship was consigned to him and a person at *Bristol*, and that till he should know to which port the ship would come he could not accept, connected with a subsequent answer that the bill was a good one, and would be paid though the ship should be lost, was held a conditional acceptance only; it being clear that the drawee looked for an opportunity of reimbursing

himself, and had three events in contemplation; the ship's arrival at *Bristol*; her arrival in *London*; and her loss: in the two latter he should have the opportunity, and therefore accepted: in the former, he should not, and did not accept. Vide *Sproat v. Mathews*, 1 T. R. 182. A conditional acceptance becomes absolute as soon as its conditions are performed. Thus an answer by the drawee that he could not accept, until a Navy Bill should be paid, was thought to operate as an absolute acceptance upon the payment of the Navy Bill. See *antea Pierson v. Dunlop*, and Bayley on Bills of Exch. 79. 81. 84.

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## D'AGUILAR v. TOBIN.

**T**HIS was an action on a policy of insurance upon the ship, the *Samuel Cumming*, at and from *Jamaica*, and *Trinidad* in the island of *Cuba*, to any port or ports of her discharge in the United Kingdoms; warranted to sail from *Cuba* on or before the 1st of *August*, 1814. Loss by capture.

The vessel took in ballast from *Jamaica*: sailed *July* 6th for *Trinidad di Cuba*: arrived the 10th. She sailed again the 1st of *August* at six o'clock, *p. m.* and got out of harbour that night. She took her course for Cape *Antonio* at the west end of the island, which it was necessary to make in order to get into the gulph stream. She called off the *Havannah*, which is on the north side of the island, but neither dropped anchor nor entered the harbour; the captain staid there less than an hour, and during that time went in his boat within the *Moro* castle. She then proceeded through the gulph in her course to *England*, and was captured by an American privateer on the 17th. The vessel had no convoy or license. There had been a convoy on the 30th of *June* from *Jamaica* to *England*, but she was not ready then. There was likewise a convoy at the latter end of *July* to *England*.

*Lens*, serjeant, objected that the ship was not authorised to go to *Havannah*; though it might be contended that she went there to seek convoy.

A vessel may deviate somewhat from the straight line of her track to seek for convoy; and the captain, unless expressly prohibited by the terms of the policy, may always do, when insured, whatever it would be expedient for the common security to do, if uninsured.

Ships sailing from foreign ports are not within the Convoy Act, unless there are persons at those ports authorized to grant convoy or licenses. And it is not sufficient to shew that convoys have been actually appointed from those ports, but proof must be given that there are persons stationed there, legally authorized by the Admiralty to appoint them.

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The clause in the policy as to the return of premium if she sail with convoy, does not authorise a deviation in quest of it.

GIBBS, C. J.—Whatever is necessary for the safety of the ship, provided it be not excluded by the terms of the policy, may be done by the captain; and what is so done, is done as agent to the underwriters. A vessel, when insured, may always do whatever it would be expedient to do if uninsured. She may deviate somewhat from the straight line of her track to seek convoy, when it is for the common good and preservation. It may be as justifiable to seek convoy as to avoid an enemy. Therefore, not only does the reduction of the premium, in case she sails with convoy, authorize her to seek it, but she is at liberty to do so for her own security.

The defendant's Counsel then relied on the 1st and 8th section of the Convoy Act, and contended that the vessel should have waited for convoy. In 1814, Admiral *Brown* was on the *Jamaica* station, and had actually appointed convoys; one on the 30th of *June*; another on the 30th of *July*. They did not produce any order from the Admiralty, which authorized Admiral *Brown* to grant convoy or licenses; but they contended, that it was to be inferred that he had this power from being nominated to the station, and having actually appointed convoys.

GIBBS, C. J.—Ships sailing from foreign ports are excluded from the restrictions of the Convoy

Act, unless there are persons at those ports authorized by the Admiralty to grant convoy or licenses. I cannot infer from the act of the Admiral in appointing a convoy, an authority from the Admiralty to grant one. This act is highly penal, and *Jamaica* might have been excluded. There is no proof that there was any convoy for *Cuba* at the time. The legislature saw it would be inequitable to oblige vessels to sail with licenses or convoy, when no one in foreign ports was authorized to grant them. I think this vessel was not within the prohibition of the Convoy Act, because it does not appear that, at the time of her sailing, there was any one at *Jamaica* legally authorized to grant convoy.

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Verdict for plaintiff.

The *Solicitor General, Best*, serjeant, and *Richardson*, for plaintiff.

*Lens*, and *Vaughan*, serjeants, and *Parke*, for defendant.

[Attornies, *Dennetts, G. and B.*——*Cooper and Lowe.*]

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The convoy acts were passed by the Legislature, from the necessity, not only of protecting trade, but of securing the objects of war, which might be endangered by the imprudent venture of merchants. They were introduced in great part during the last war and the commencement of the present. A rule has thus been established, that a private merchant vessel, unless with a previous license, must not sail,

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during hostilities, on a foreign voyage without convoy. Thus every vessel is required, 1. Not to depart from port unless under such convoy as may be appointed. 2. To continue with the convoy during the whole voyage, or such part of it, as the convoy shall be directed to accompany the ship. 3. All insurances, whether on ship, cargo, or freight, are avoided, on the event of a voluntary breach of these laws. 4. Officers of the Customs are required to withhold any ship, which ought to sail with convoy, until the master shall have given a bond, with one surety, to comply with the act.

But the regulations of the act do not extend, 1. To any ship that is not required to be registered. 2. Nor to any ship having license to depart without convoy. 3. Nor to any ship proceeding with due diligence to join convoy from the port of her clearance, in case of the convoy being appointed to sail from such other place; the master, however, giving the bond before-mentioned. 4. Nor to any ship bound from any place in the United Kingdom, to any place within the same. 5. Nor to any ship belonging to the East India or Hudson's Bay Companies. 6. Nor to any ship departing

without convoy from any foreign port or place, in case there should not be any convoy appointed for such ship; nor any person at such foreign port authorized to appoint a convoy. Nor, lastly, to any ship employed in the Newfoundland fishery. Vide 43 G. 3. c. 57.

The sailing with convoy required by this act is a sailing with convoy for the voyage: and it is not sufficient to sail with a convoy appointed for another voyage, though it may be bound upon the same course for great part of the way; and a ship cannot legally sail from port to port without convoy, unless she is bound from port to port; and if a convoy has sailed, a ship cannot legally endeavour to overtake it. *Cohen v. Hinckley*, 1 Taunt. 249. But the statute 43 G. 3. c. 57. does not avoid policies on ships sailing without convoy, unless the party interested in the insurance was privy to or instrumental in the sailing without convoy. *ibid.* *Henderson v. Hinde*, 1 Taunt. 250. n. See likewise *Webb v. Thomson*, 1 Bos. and Pul. 5. *Anderson v. Pitcher*, 2 Bos. and Pul. 164. From the two last cases it appears, that the master of the trading vessels should not omit to obtain the sailing instruc-

time and manner delivered out by the commander of the convey. In *Shannon v. Parker*. Lord Emswiler observed: "The case of a convey appointed by Government means from its taking the ships under contract, as well as under protection. But that contract does not commence until sailing instructions have been obtained; nor can it be enforced otherwise than by their means. Without (sailing instructions) the ship does not stand in that relation, or under those circumstances, in which she can take the full benefit of the Government convey. If the fleet be dispersed by a storm, how is she to learn the place of her rendezvous? If it be attacked by the enemy, how is she to

show signals? In short, what communication can the vessel have with the commanding force?" But if the master or al. is his power to obtain sailing instructions, but is prevented from obtaining them by business of weather, or if they are refused by the commander of the convey, he is excused. In such cases he would be excused, although there were a warranty to sail with convey. Vide *Abbott on Shipping*, 243, and the cases cited on this last point in the notes. The convey act is a very penal act, and therefore to be construed strictly. Vide *Carstairs v. Allmond*, 3 Camp. 497. *Wainhouse v. Court*, 4 Taunt. 178. *Wahr v. All*, *ibid.* 463. *Jagham v. Agnew*, 15 East, 517.

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BROWN and Another, Assignees of RIORDEN,
v. FORRESTALL and Another.

Notwithstanding there has been no notice to dispute the commission, act of bankruptcy, &c. under the 46 Geo. 3. c. 135. s. 10. the proceedings are not conclusive evidence of the facts therein stated; but the Court is still to form a judgment upon them, whether they prove an act of bankruptcy or not.

THIS was an action for goods sold and delivered. The question was, whether the payment of a bill of 100l. was in the ordinary course of business, and, as such, protected. The plaintiffs' counsel contended, that the defendants knew the bankrupt to be insolvent at the time, and had received notice from the plaintiffs that he had committed an act of bankruptcy. The commission bore date the 26th of August, 1815, and no notice had been given to dispute the proceedings, &c. On their being read, the counsel for the defendants objected that they did not prove a sufficient act of bankruptcy.

Best, serjeant.—The defendants should have given notice that they intended to dispute the commission; they cannot now object to the proceedings; they are conclusive against them. By their silence they admit all things relating to the bankruptcy to be *rite acta*.

Solicitor General, contra.—Notwithstanding there has been no notice to dispute the commission and act of bankruptcy, the proceedings are not conclusive. It is true they may be read, but it is still within the breast of the Court to say,

whether they disclose a sufficient act of bankruptcy.

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GIBBS, C. J.—They are admissible evidence; but I am still to form my judgment upon them, whether they prove an act of bankruptcy or not.

Nothing material arose upon the other part of the case.

Verdict for plaintiff.

Best, serjeant, and *Buller*, for the plaintiffs.

The *Solicitor General* and *D. F. Jones*, for defendants.

[Attornies, *Holt* and *F.*—*Speaks.*]

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TAYLOR and Others v. CURTIS.

A general ship is freighted by several merchants and sails upon her voyage: she parts with her convoy in a gale of wind, and is afterwards attacked by an American privateer, which she engages and beats off, with the loss of one man killed and four wounded; her hull and rigging are likewise damaged in the conflict; but she reaches her port and delivers her cargo safely. — Held, that the repairs of the ship, and the expences of curing the wounded sailors, are not, under such circumstances, a subject of general average.

THIS was an action of assumpsit to recover a contribution from the defendant in the nature of general average, under the following circumstances:—The plaintiffs were owners of the *Hibernia*, a general ship, on board which the defendant had shipped some goods, consigned to certain merchants at *St. Thomas's*, in the *West Indies*. In November, 1813, the *Hibernia* sailed on her voyage, under convoy of his Majesty's ship the *Queen*. In consequence of a hurricane she was separated from her convoy, and on the 11th of December fell in with an American privateer. The Captain, seeing no prospect of escaping by sail, determined to resist. The *Hibernia* mounted only six guns, and her crew consisted of 22 men. The American privateer carried 22 guns, and had 125 able seamen on board. Notwithstanding this disparity of force the *Hibernia* engaged her, and, after a conflict of eleven hours, in which her hull and rigging were greatly damaged, one of her crew killed, and four wounded, she succeeded in beating off the privateer. The *Hibernia* arrived at *St. Thomas's*, almost a wreck, and delivered her cargo in safety to the respective consignees. The value of the entire cargo was 21,092*l.* and the goods shipped by the defendant were to the amount of 1000*l.* The estimated entire loss to the plaintiffs was 2,908*l.* and the average, as calculated upon


the defendant's proportionate share, amounted to 138*l.* 8*s.* 5½*d.* which the plaintiffs sought to recover by the present action. Part of the charges was for medical and surgical expences for the wounded.

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Best, serjeant, for the defendant, contended, that the present loss did not fall within the principle of general average. The owners had made no extraordinary sacrifice for the common benefit; they merely discharged a duty. The sailors were bound to defend the ship from an enemy. This was a loss therefore within the scope of their positive duties as mariners, and gave no right to the owners to call upon the freighters for contribution. There is another strong objection to this action; it is *primæ impressionis*.

Lens, serjeant, contra.—The whole concern was in danger of capture; the ship and the cargo. By the extraordinary exertions and sacrifice of the captain and his crew the vessel and the goods on board are preserved. Natural justice requires, in such a case, that the loss should be borne proportionately by all who are interested.

GIBBS, C. J.—I do not think this is general average. It was the duty of the sailors to defend the ship from capture in proportion to their means, and within measures of discretion. By so doing all parties have benefited. But in what respect have the captain and crew exceeded the line of their proper duty? What sacrifice have they made which they were not bound to make? The expence of medical and surgical aid must be borne

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by the parties themselves: although this may be an ungracious defence, I am of opinion that it does not fall within the principle of general average.—His Lordship directed a verdict for the defendant, with liberty to the plaintiffs to move to set it aside.

Lens, and *Copley*, serjeants, and *F. Pollock*, for plaintiffs.

Best, and *Vaughan*, serjeants, for defendant.

[Attornies, *Annesley* and Son.———.]

General average is founded upon the principle of the equity of the cases to which it is applied. Much is not to be met with in the law books on this subject. In the Treatise of Mr. Justice *Abbott*, on shipping, this subject is examined with the learning and accuracy of that able lawyer and writer. Vide page 354 to 374. With deference to such a writer, and to such a work, we shall beg leave to add what has presented itself to our minds in reflecting upon the subject.

General average is founded on this simple principle of natural justice; that where two or more parties are concerned in a common sea risk, and one of them makes a sacrifice for the general safety, the loss shall be assessed upon all in proportion to the share of each in the venture; and the greater

sacrifice of the first shall be compensated by the contribution of the others. It seems totally unnecessary to go to the Rhodian or Roman law for what common sense and common justice must suggest to every one; and though it be pleasing to learned curiosity to perceive the customs of our own times confirmed by such ancient precedents, we should be satisfied with finding the analogy, without grounding ourselves upon it as the reason. General average, in a word, is the common law and justice of partnership. General average, therefore, defined according to its nature, is a compensation from the common stock of a sea venture, in the several proportions of the partners in it, for the special loss or sacrifice made by one or more for the

common good. Three things, therefore, are necessary to constitute any claim upon the ground of general average :

1. That there should be a special sacrifice by one or more for the benefit of the whole.
2. That it should be for the purpose, and with the intent, *causâ et mente*, of the preservation of the common concern.
3. That the common concern should be saved by the partial sacrifice.

The special sacrifice, it would appear, must be something done and not suffered ; there must be the will and agency of the party making it ; his actual or presumed content. Thus, in *jettison*, or, to employ the more ancient term of the *lex Rhodia*, the *jactura mercium*, the owner himself of any part of the cargo might throw it overboard, or the captain or mariners might do it for him. In the same manner if part of the furniture of the vessel be sacrificed, for instance, if a mast be cut down, or a cable thrown overboard, the owner would be entitled to general average, the presumption being, that such sacrifice is made for the safety of the cargo as well as for the preservation of the ship. But, in order to found the claim, this sacrifice must have been made, as well

for the sake of the cargo as for the ship. If merely for the sake of the ship, nothing has been done for the cargo, and therefore nothing can be claimed for it. If a ship strike on a rock, or be stranded, in the first place, it is something suffered and not done ; and, secondly, it is nothing either suffered or done for the sake of the cargo. No claim, therefore, to general average lies here. But if a mast be then cut down, or any part of the cargo thrown overboard in order to save the rest from perishing, there will be, *quatenus* the mast cut down, and the portion of the cargo thrown overboard, a general average ; but with respect to the damage to the hull, or any other part of the ship, by the rock or stranding, there will be none. Again, if the cargo be landed in the ship's boats, and the masts be then cut down, to get the ship from the rock, it would be at least doubtful whether, the mast being cut down for the ship, and not for the cargo, general average would lie ; if the cargo were not reloaded, certainly not. Thus in the case in the text : in the injury suffered by the *Hibernia* and the sailors, there was nothing special done—there was nothing done or

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suffered beyond what each was bound to do and suffer for himself—nothing was done for the sake of the cargo which would not have been done in the same manner if the ship had been in ballast. The captain and crew were bound to do their best to save the ship from capture; the vessel, the freight, and their own liberty were in peril. Self-defence, under these circumstances, was natural; it was their duty. There was no special sacrifice, in the words of the first term of our definition.

The second requisite to constitute the claim of general average is, as we have above said, that the sacrifice be made *causâ et mente*, that is to say, for the intent and purpose of saving the common stock. In the case in the text, the intent and purpose were self-preservation; the safety of the cargo was indeed the incident and consequence, but not the purpose and intent of the resistance.—The third requisite is, as stated above, that the common concern should be saved by the partial sacrifice; for if lost, the whole fund is gone, and every partner, of course, loses his share. The health and limbs of the seamen are part of the materials of the seamen; they are the means of

his doing his duty. They are hired with the man. Whatever accident occurs to them is an incident belonging to the man himself. It is tantamount to an injury to his tools or means of work. But the rule of the ancient law, and which is fully adopted by our own, is, "that the broken tools of an artificer shall be at the loss of himself, and not of his employer." In the same manner with the ship, and the perils of navigation to which it is incident. They are all in the same way exempted from general average; in the first place, from the nature of the thing—and, secondly, because there is always an implied understanding that incidents of this kind shall fall upon those by whose caution, in their own immediate peril, they may be best guarded against.

There are some cases on the subject of general average in the modern reports, but much is not to be collected from them. The safest guide will be principle well studied and understood.

Berkley v. Prasgrave, 1 East, 220. *Covington v. Roberts*, 2 Bos and Pull, New Rep. 378. *Hunter v. Princeps*, 10 East, 378.

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LENT ASSIZES, 56 GEO. III. 1816.

SENIOR v. SIR GEORGE ARMYTAGE, BART.

ASSUMPSIT special, by tenant against landlord, to recover a certain sum by way of compensation for half-tillage, crops sown, value of away-going crops, &c. under the denomination of tenant right, according to the custom of the country. The declaration stated the custom to be, for the tenant to provide work and labour, tillage, sowing, and all materials for cultivation, in the away-going year; the landlord to make a reasonable compensation for the same, except in the case of exemptions by special agreement. The declaration, moreover, contained an averment that defendant was not exempted from the operation of the custom by any special agreement.

A custom for the tenant of a farm in a particular district to provide work and labour, tillage, sowing, and all materials for the same, in his away-going year, and for the landlord to make him a reasonable compensation for the same, is valid in law, notwithstanding the farm is held under a written agreement; provided such agreement does not in express terms exclude the custom.

This cause had been tried at the last assizes, before Mr. *J. Bayley*, when it appeared upon the evidence for the plaintiff, that a written agreement existed between the parties; and the learned Judge being of opinion that the plaintiff was bound to produce the agreement, and that the custom was controlled by it, directed the plaintiff to be nonsuited.

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But the Court of King's Bench afterwards decided, that, unless the agreement in express terms excluded the custom, it was still operative. The Court, therefore, set aside the nonsuit and directed a new trial.

The plaintiff's counsel now contented themselves with proving the custom, which appeared to prevail only in the immediate neighbourhood of the defendant's estates, and to be almost confined to those estates.

The defendant's counsel, having procured evidence of the existence of the written agreement, contended, that the plaintiff ought to produce it, in order to support the averment in the declaration, that it did not exclude the custom.

To this it was answered, that the plaintiff was not called upon to prove a negative, and that it was incumbent upon the defendant to shew that the agreement excluded the custom.

Of such opinion was Lord Chief Baron Thompson.

It was then objected for the defendant, that, as it appeared in evidence that the custom was not a general custom, but prevailed only in a particular district, it was not binding on the defendant.

But the Chief Baron was of opinion that it was sufficient for plaintiff to shew that the custom existed in the particular place.

The defendant's counsel afterwards addressed the jury on the unreasonableness of the custom against the landlord, to establish which they called several stewards of the first landholders in the county of York; they further contended that the written agreement was incompatible with the supposed custom.

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On the other hand the plaintiff's counsel contended that one clause in the agreement (viz. that all manure, compost, &c. was to be used on the farm, and left on the land at the expiration of the holding, without the tenants' claiming any allowance for the same) implied the existence of the custom.

The Chief Baron told the jury, that this was quite a distinct custom from that which usually prevails between the in-coming and out-going tenants. But that, if they were satisfied of its existence (about which there could be little doubt, as it was in evidence that the defendant had paid the amount of a valuation made under it to the former tenant of this very farm) they must find a verdict for plaintiff. And that as to the special agreement, in order to control the custom, it must be of such a nature that it operated upon, and prevented, in express terms, the custom from attaching, which did not appear to be the case here.

The jury found for the plaintiff.

Searlett and *Richardson* for plaintiff.

Raine, *Heywood*, *Maude*, and *Littledale*, for defendant.

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Though, in respect to written instruments generally, no custom or usage can be introduced to add any thing to the terms of the contract, which the parties (in the full deliberation which the law always presumes to accompany such instruments) did not think proper to stipulate; yet, in leases of farms, &c. the usage or custom of the district, as a kind of *lex loci*, is allowed to add either to the form of the stipulations, or to annex even suppletory obligations of its own, so far as they are not contradictory to what is expressed in the written instruments. The reason is evident. The law presumes that each party intended what each knew to be the common practice of the vicinity, and that each omitted the express mention of it, only because it was so notorious.

Thus in *Wiglesworth v. Dalison*, Douglas, 190, in which

the alleged custom was, for tenants, whether by parole or deed, to have the away-going crop after the expiration of their terms; amongst the several objections urged to this custom, it was contended, that a lease by deed precluded the operation of the custom, as the parties must be supposed to have described all the circumstances relative to the intended tenure in the written instrument.

LORD MANSFIELD.—“ The custom of a particular place may rectify what would otherwise be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking; as a heriot may be due by custom, although not mentioned in the grant or lease.” Dougl. 197.

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SMITH v. BOLTON, Esq.

THIS was an action against the hundred on the stat. 1 Geo. I. st. 2. c. 5. brought by the tenant of a public house at Hull, to recover the amount of damage done to the furniture, liquors, plate, china, money, and wearing apparel of himself and his wife, in consequence of the demolition of the house by a mob of rioters. The landlord had recovered, in the preceding cause, the amount of the damage done to the freehold. The sum now sought to be recovered was 434*l*. There was no doubt as to the riot and demolishing, which were occasioned by the impressment of a seaman, who had been rescued; and the press-gang had fled to this house, which was their general rendezvous.

In an action against the hundred, held, that they are only liable for things demolished by the rioters, or destroyed in the demolition of the house, and not for any goods stolen or lost from the premises.

But the defendant's counsel contended, that the amount of the damages must be confined strictly to the value of those articles which had been actually demolished by the rioters; and could not be extended to those which, for any thing that appeared in evidence, might have been surreptitiously removed from the premises; that this latter was a distinct felony, and the act meant that the hundred should make compensation only for the damage which was the direct and immediate consequence of the offence.

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They admitted the hundred to be liable for the value of furniture and china found broken, and the casks staved, upon the premises; but they denied their liability for the plate, money, and clothes, concerning which no evidence had been given, except that they were upon the premises a short time previous to the demolition of the house.

LE BLANC, J.—I agree with you, in point of law, that the hundred are not liable for things that are not demolished by the rioters, or destroyed by the demolition of the house—that they are not liable for any thing stolen or taken away.

The defendant's counsel called no witness, and

LE BLANC, J. told the jury, that their province was to estimate the damage by demolition which had been the immediate consequence of the riot. That the difficulty would be, to ascertain what were the things which had been either wholly or in part destroyed. That there was no actual proof of the removal of any of the articles; but it was difficult to conceive how the plate, clothes, or money in the till, could be destroyed in the demolition of the house. That the amount of the damage actually proved was 85*l*.

The jury gave the plaintiff 100*l*.

Scarlett and Alderson, for plaintiff.

F. Pollock and Wray, for defendant.

In a case tried at *Westminster* sittings, after Hilary term, 1816, Lord *Ellenborough*, Chief Justice, held, that in order to sustain this action against the hundred, circumstances must be proved from which the jury may infer that the object and intent of the mob was totally to demolish the house, &c. The words of the act begin, "shall begin to demolish, &c." And, therefore, that where the mob, after breaking the windows, and doing other damage to the house, had retired without demolishing it, and without any disturbance having been given to their operations, the hundred was not liable. But slight evidence is sufficient to raise the presumption of an intent to demolish; and therefore, in the same case, it having been afterwards proved that there were military patrolling the streets in the neighbourhood of the house in question, that the rioters were dis-

persed in various parties, which kept up a communication by signals, and that previous to their retiring from the house it was observed that a signal was received by the party demolishing; his Lordship directed the jury that these were facts from which they might fairly infer that the rioters were checked in their proceedings by the proximity of the troops, and had begun their operations with an intent to demolish.

They accordingly found for the plaintiff.

For cases upon this act vide *Ratcliffe v. Eden*, Dougl. 699. *Hyde v. Cogan*; and *Wilmot v. Horton*, there cited. *Prichett v. Waldron*, 5 T. R. 14. *Reid v. Clarke*, 7 T. R. 496. *Burrows v. Wright*, 1 East, 615. *Greasley v. Higginson*, 1 East, 631. There is likewise a very elaborate and learned note upon the construction of this act, *William's* edition of *Saunders*, Vol. 2, 377a.

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BREED and Others v. GREEN and Another.

A. and Co. of *Liverpool* employ R. and Co. as their bankers there: R. and Co. keep an account in *London* with J. and L. But A. and Co. have no account with J. and L. A. and Co. direct their agents in *London* to pay monies to 'their account' at the house of J. and L. As A. and Co. had no account of their own with J. and L. but through the medium of R. and Co. of *Liverpool*, and as their agents had been in the habit of paying monies of A. and Co. to the account of R. and Co. at the house of the *London* bankers of R. and Co.; held, that the direction of A. and Co. to their agents to pay to "their account" was sufficiently complied with, by a payment made to the account of R. and Co. as the agents had been in the habit of doing.

MONEY had and received. The plaintiffs had employed the defendants as their agents and consignees in *London*, to sell goods, and dispose of the proceeds according to their directions. They had at first been directed to pay the proceeds into the banking-house of *Esdaile* and Co., afterwards into the house of *Jones, Loyd, and Co.* Plaintiffs had no account of their own with either of these houses, but *Roscoe* and Co. were their bankers at *Liverpool*, who kept an account with *Esdaile* and Co., which account they had just transferred to *Jones, Loyd, and Co.* The particular transaction arose out of the sale of some American stock.

On the 20th of *January*, 1816, the plaintiffs wrote to the defendants, desiring them to sell the stock, and to pay the proceeds to *Jones, Loyd, and Co.*, adding "for our account." On the 23d, the defendants answered that they had accepted the order, and would pay in the proceeds the next day,

"for their account." On the 25th they wrote as follows: " We have paid the money, agreeably to your desire, into the hands of *Jones, Loyd* and Co. We inquired if you had an account open with them that we might have it placed thereto; but, being told you had not, we desired it to be placed to the credit of your account with *Roscoe* and Co. We trust we did right; this being in fact the only manner in which *Jones, Loyd*, and Co. would take it at all." Several orders were read, in which plaintiffs had directed the defendants to pay money to *Esdaile's* house, to be placed to the credit of their account with *Roscoe* and Co., and the defendants had never paid, on any occasion, money to the sole account of the plaintiffs at either house. In one or two instances it appeared that money had been paid to the credit of the bankers' (*Roscoe* and Co.'s) account, when it had been directed to be paid to the credit of the plaintiffs', or one of their partners. During the whole time that defendants were the agents of the plaintiffs, *Roscoe* and Co. were their bankers at *Liverpool*, and defendants paid the proceeds of the sales which they made for the plaintiffs into the house of *Jones, Loyd*, and Co., in the same manner in which they had been accustomed to pay at *Esdaile's*; that is to say, to the account of *Roscoe* and Co. at *Jones, Loyd*, and Co. On the 25th of *January* *Roscoe's* house suspended payments. At that time the money was in the hands of *Jones, Loyd*, and Co. to their credit. They apprised *Roscoe's* house of the payment, and received for answer that the money was to be struck out of their credit, as they had received plaintiffs' order not to place it to their account.

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and Others
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GREEN and
Another.

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Another.

Upon plaintiffs' applying for the money to *Jones, Loyd, and Co.*, they refused to pay it, alleging that they had received it to the credit of *Roscoe and Co.*, with whom they had an unsettled account, and they must hold it for the benefit of all parties.

Raine, for the plaintiffs, contended, that defendants had acted contrary to the orders they had received, and were therefore bound to refund. It was their duty, either to have rejected the order to pay altogether, or to have executed it according to the specific directions which were sent.

Scarlett, contra.—There was an express direction to pay the money into some account, which must mean an existing account. Now the plaintiffs had no account with *Jones, Loyd, and Co.*, but through the house of *Roscoe and Co.*

LE BLANC, Justice.—If the plaintiffs intended to have an account opened with the *London* bankers, they ought to have given specific directions; they should have spoken in language plain and intelligible, which could not have misled. As they have not given any such specific directions, the defendants were justified in paying the money as they had been in the habit of doing.

Upon his Lordship expressing this opinion, the plaintiffs' Counsel chose to be nonsuited.

Raine and Littledale, for plaintiffs.

Scarlett, Richardson, and F. Pollock, for defendants.

[Attornies, *Stuistrect* and *Eden*.———*Allen*.]

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and Others  
v.  
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Another.

DICAS v. HIDES.

March 28.

THE declaration stated that the defendant was an innkeeper, and licensed to let post horses ; that on the 22d of *December*, 1815, plaintiff was received into his house as a guest and traveller ; that he requested the defendant to let him to hire a post chaise and horses to convey him on his journey : it then stated that defendant at the time had post chaises and horses unemployed. The declaration likewise averred the tender of a reasonable sum for the hire of the chaise, &c. ; but that the defendant refused to let him have one. Plea: Not guilty.

An innkeeper, who has a license to let post horses, is not bound by the common law to furnish them to a traveller, though he have a chaise and horses at liberty at the time of the application, and though a reasonable price be tendered to him for the hire.

The defendant kept an inn at *Four Lane Ends*, at *Hulton*, in *Lancashire*. Upon the sign over his door was written "licensed to let post horses." Notice had been given him to produce his license. Plaintiff was on his road from *Wigan* to *Manchester*, and stopped at defendant's inn to change

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horses, and to proceed on his journey. It was stated by the plaintiff's Counsel, that the defendant at the time had post chaises and horses at liberty in his stables; and that he offered to convey the plaintiff on his journey with four horses; but plaintiff would only consent to take two, which were refused.

*Scarlett*, for the plaintiff, contended, that when an innkeeper takes out a license to let post horses, he enters into a contract with the public to let them out for the accommodation of passengers. He has no right to select his customers; to say, he will serve one man and not another. He cannot evade this duty by demanding exorbitant prices. If he has the convenience, he ought to furnish it when a reasonable price is tendered. The plaintiff tendered the money, and no private pique ought to induce an innkeeper to withhold the accommodation.

*Raine*, for the defendant, contended, that this was an action of first impression; that it could not be supported in law; but that he was ready to meet it on the merits.

LE BLANC, Justice.—The declaration does not state any custom of the realm, but merely a duty. I am of opinion that there is no legal obligation on the defendant to let post chaises and horses, notwithstanding he has obtained a license for so doing. The action, therefore, is not maintainable. I will, however, save the point.

The defendant's counsel, to prevent coming again, requested that the case might go to the Jury on the merits. Accordingly they called witnesses, and proved that the defendant had not horses capable of performing the journey at the time.

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 v.  
 HIGGS.

Verdict for the defendant.

*Scarlett and Cottingham* for plaintiff.

*Raine and Cross*, for defendant.

[Attornies, *Smith*.———*Foulkes*.]

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FARNWORTH and Others, Assignees of CURTIN, a  
 Bankrupt, v. PACKWOOD.

THE defendant was an innkeeper at *Birmingham*. On the 23d of *January*, 1813, *Curtin* brought goods with him to the inn for sale as he was travelling through the country. He staid at the inn about 14 days, and eat and slept there. His goods were deposited in a parlour on the ground floor; for two or three days he had the key of this room in his possession, and used to lock it up. Afterwards the landlady wished to put some goods of other travellers there, and asked his permission. He gave her leave, and delivered her the key for that purpose; but desired that the key should always be kept within the bar, that he might have it when he wanted it. Other parcels were put in the room; and, a few days after *Curtin* delivered up the key, he lost a package of the value of 50*l*.

If a guest demand, and have exclusive possession of a room, for the purpose of a shop or warehouse, he exonerates the landlord from any loss he may sustain in the property which he keeps in that apartment. But if he have not an exclusive possession, the landlord is liable.

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*Raine*, for the defendant, contended, that if this had been a lodging-room the landlord would have been answerable for any loss, though the guest had a key to lock it. But the room in question was taken as a warehouse for *Curtin's* goods. It was not an apartment to sleep or dine in, but for the purposes of trade. The landlord, therefore, was not responsible under such circumstances.

The defendant's Counsel then called witnesses to prove that the key was exclusively under *Curtin's* controul; the evidence on this point was contradictory.

LE BLANC, Justice.—The landlord is not liable, in a case where the guest, by way of excessive caution and security, takes an exclusive charge of a room or of goods. The guest may so conduct himself as to waive the common law liability of the landlord. But the question is, did *Curtin* take upon himself exclusive possession of the parlour; that is to say, exclusive of the landlord and other persons. A landlord is not bound to furnish a shop to every guest. If a traveller applies for a room, not to sleep or live in, but as a shop or warehouse, and takes an exclusive possession, he exonerates the landlord. Whilst *Curtin* kept the key himself, the landlord was not answerable; but when he delivered up the key to the landlady; when other persons had access to the room, and other goods were deposited there, the landlord's liability revived. If *Curtin* had exclusive possession he must bear the loss; but if, at the time the goods were lost, they were not under *Curtin's* exclusive care, the defendant is responsible.

His Lordship left the case to the Jury on the evidence, who found a verdict for the defendant.

*Scarlett and Richardson*, for plaintiff.

*Raine and Littledale*, for defendant.

[Attornies, Gaskell.——Chater.]

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The goods of a traveller are not in the custody of the innkeeper, so as to charge him with any loss, unless they are placed within the inn. Calye's case, 8 Rep. 63. Therefore, if the guest require the host to turn his horse out to pasture, who accordingly does so, the liability of the innkeeper is discharged. *Secus*, if the innkeeper of his own accord puts it to grass; in which case his responsibility is the same as if the animal had remained in his stable. 8 Rep. 64. The guest need not deliver the goods in special charge to the innkeeper, nor acquaint him that he has any. If the traveller have property with him, or about his person, the innkeeper is bound to the custody of it without communication. The duty is founded on the common law, and is derived from the relation of traveller and host. *Ibid*. But the innkeeper may require that the property of his guest be delivered into his hands, in order that it may be put into a

secure place; and if the traveller refuse, the innkeeper is not responsible for its safety. *Ibid*. The host cannot oblige the guest to take charge of his own goods, for this, in effect, would be a refusal to admit them into the inn. (See *Bennet v. Mellor*, 5 T.R. 273.) And it is no excuse for an innkeeper to say, that he delivered the key of the chamber, in which the property stolen was placed, to the guest, who left the door open. Calye's case, 8 Rep.

But in a late case Lord Ellenborough observed, that although the landlord cannot exonerate himself by merely handing over a key to his guest, yet, if the guest takes the key, it is a proper question for the jury whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability. *Burgess v. Clements*, K. B. Trinity Term, 55 G. 3. See likewise Comyn's Digest, Vol. 1, 285; and Hammond's Law of Nisi Prius, 322, 323.

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## GASKELL and Another v. LINDSAY and Another.

A. and Co. guaranteed to B. and Co. payment for any goods which they might supply to C. within a certain period, at a credit of 2 and 2 months. C. becomes indebted to B. and Co. for goods, and gives them three bills of exchange, in payment, indorsed by A. and Co. who shortly afterwards become bankrupts.—One of these bills was dishonoured before, and the other two bills after, their bankruptcy. C. was likewise indebted to B. and Co. before the bankruptcy of A. and Co. for some goods, for which they had a right only to call on C. to give them a bill at two months, at the time of A. and Co.'s commission. Held, that in an action, brought upon the guarantee, against A. and Co. their certificate was a good defence, by virtue of the stat. of the 49th G. 3. c. 121. s. 9.

**T**HIS was an action on a guarantee, given by the defendants to the plaintiffs, by which they engaged to indemnify them for whatever goods they should supply to one *David Irvine* in his line of business, from the 27th of *July*, 1809, to 27th *July*, 1810. One of the defendants suffered judgment by default: *Lindsay* pleaded his bankruptcy, upon which alone the question arose. It appeared that the dealings between the plaintiffs and *D. Irvine* were upon the usual terms of credit in the trade, viz. two and two months; that is to say, at the end of two months from the time of the goods delivered, the plaintiffs had a right to call upon *D. Irvine* for a bill at two months. In the course of their dealings, the plaintiffs received three bills of exchange, drawn and accepted by other parties, but indorsed by the defendants to *D. Irvine*, and by him indorsed to the plaintiffs in payment of goods. One of these bills became due, and was dishonoured, before the bankruptcy of the defendants; the second bill became due and was dishonoured; but the plaintiffs did not receive notice of the dishonour till after the bankruptcy of the defendants; and the third bill did not become due till six weeks after the commission. In addition to the three bills which were running, it appeared that *D. Irvine* was still indebted to the plaintiffs for a parcel of goods, to the amount of 93*l.* 12*s.* supplied on the

4th of *December*, 1809, and for which they had a right to call upon him for a bill at two months on the 4th of *February*, 1810. The defendants' commission was dated on the 6th of *February*. No notice had been given to them of *D. Irvine's* default in not giving the bill on the 4th. No bill was in fact demanded or given for the 93*l.* 12*s.* and, shortly afterwards, *D. Irvine* absconded. The plaintiffs sought to recover the amount of the goods sold, for which the three bills of exchange were indorsed to them by *D. Irvine*, and likewise the balance of 93*l.* 12*s.* for which no bill had been received.

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On the part of the defendants it was contended, that the three bills were clearly barred by the certificate, and *Le Blanc*, Justice, was of that opinion, inasmuch as they appeared to have been given by the defendants in satisfaction of the guarantee.

*Holt*, and *Parke*, for the plaintiffs, proposed to shew that the three bills had been given by the defendants to *D. Irvine* for a valuable consideration, without reference to the guarantee, and that they had been indorsed to the plaintiffs, in the common course of trade, in payment for goods supplied to *D. Irvine*. They called a witness for this purpose, who produced the books of the bankrupts, and was about to read an entry made by one of the defendants (who suffered judgment by default) in which the account between the bankrupts and *D. Irvine* was stated. It was objected that the entry, having been made by one partner after the bankruptcy, could



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not bind the other partner. *Le Blanc*, Justice, was of this opinion.

They then contended, that, at any rate, the plaintiffs had a right to recover the 93*l.* 12*s.* That, for this sum, they were only entitled to receive a bill on the 4th of *February*; and that the money did not become due, as a cash payment, till near two months after the defendants' bankruptcy: they said, that this was not a debt which could be barred by the certificate, because it was not a debt which could be proved under the commission. It was not a liquidated claim, which plaintiffs could have put into an affidavit; which they could have gone before the Commissioners, and claimed to prove in the ordinary manner. It was a mere right of action against D. Irvine, to recover damages for omitting to give a bill of exchange; this was the extent of the plaintiffs' claim against the principal, Irvine; and of course, therefore, in his default, this was the extent of the collateral engagement of the defendants. The damages in such a case, being for the non-performance of a contract, could not be ascertained without the intervention of a jury, who might give more or less according to the circumstances.

*Scarlett* and *Richardson*, contra, relied on the 49 Geo. III. c. 121. s. 9.

LE BLANC, Justice.—I think the three bills appear to have been given in satisfaction of the guarantee; they are barred, therefore, by the certificate. I think likewise that the 93*l.* 12*s.* is

barred by the certificate, under the statute, which the defendant's counsel rely upon.

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Verdict for defendant *Lindsay*.

*Holt and Parke*, for plaintiffs.

*Scarlett and Richardson*, for defendants.

[Attornies, *Garnett*.—*Foulkes*.]

Formerly no debts could be proved under a commission of bankruptcy but such as were *debita in præsentia* at the time of the bankruptcy. The 7 G. 1. c. 31. extended the right of proof to certain written securities, not due at the time of the commission, but which, being liquidated and ascertained in their quantity at that time, would become due in future. Such debts were admitted to be proved, allowing a rebate of interest. The 5 G. 2. c. 30. allows such demands to constitute a good petitioning creditor's debt.—The 49 G. 3. c. 121. s. 9. extends the same right of proof to debts, of which the term of credit had not expired upon the issuing of the commission, and which, therefore, at that time, were not *debita in præsentia*. In all these statutes the

expression is *debt*; and this word appears to be used in contradistinction to damages, and to point at a demand where the sum, or *quantum*, is settled and certain, and not, like damages, the subject of enquiry or computation. The expression in the several statutes, '*rebate of interest*,' seems to imply this. Vide *ex parte Adney*, Cowp. 460. *Utterson v. Vernon*, 4 T. R. 570. *Bannister v. Scott*, 6 T. R. 489. *Hammond v. Toulmin*, 7 T. R. 612.

The stat. 7 G. 1. c. 31. s. 1. is confined to written securities. 2 Peer. Williams, 306. *Swaine v. De Mattos*, Strange, 1211. See likewise *Chilton v. Whiffin*. *Goddard v. Vander Heyden*, 3 Wils. 262. *Pattison v. Bankes*, Cowper, 540.; and *Parslow v. Dearlove*, 4 East, 438. So likewise it has been

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determined, where goods were sold and delivered upon an agreement to be paid for by a present bill payable at a future day (but which bill never was given or demanded, and seven days after the delivery of the goods the debtor committed an act of bankruptcy,) that this did not create a present debt sufficient to enable such creditor to petition for a commission of bankruptcy against the debtor; the 7 G. 1. c. 31. s. 1. and 5 G. 2. c. 30. s. 22. being confined to *debts* due on bills, bonds, promissory notes, and other personal *written* securities, of the like sort, payable at a future day. *Hoskins v. Duperoy*, 9 East, 498. See likewise, as illustrative of the general principle in the latter case, *Mussen v. Price*, 4 East, 147. and *Dutton v. Solomonson*, 3 Bos. and Pull, 582. So, in *Hancock v. Entwistle*, 3 T. R.

435, it was determined, that if a demand be payable *at all events*, though at a future day, it may be proved under a commission: but if it rest in contingency whether it will become payable or not, it cannot be proved, unless it be secured by a penalty which is forfeited at law.

With respect to debts due at a future day, the 49 G. 3. c. 121. s. 9. is an enlargement of the provisions in the former statute, 7 G. 1. c. 31; and as that statute extended the right of proof to written securities only, payable on a future day, the 49 G. 3. embraces debts of all kinds, written or unwritten, upon good and valuable consideration, for any money whatsoever, which is, or shall not be payable at the time of the bankruptcy, allowing a rebate of interest on the proof of such debt.

# CASES

ARGUED AND DETERMINED AT

## NISI PRIUS

IN THE

COURT OF COMMON PLEAS.

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SITTINGS IN EASTER TERM, AT WESTMINSTER,  
56 GEO. III. 1816.

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HILL v. LEIGH and REAY, Sheriff of Middlesex.

**D**EBT for an escape.—Plea *nil debet*.—The plaintiff had obtained final judgment against a person of the name of *Coningham*, and sued out a writ of *capias ad satisfaciendum*, directed to the defendants, sheriff of *Middlesex*, returnable on

In an action against the sheriff for an escape, the regular way of connecting him with his officer, so as to make him responsible for his act, is by the production of the warrant. But any recognition by the sheriff, that the officer acted under his authority, will dispense with the necessity of producing it. An indorsement upon the writ, (returned and filed by the sheriff,) of the name of the officer, is not sufficient to make the sheriff responsible, without proving that his name was written upon it by the authority, or with the privy of the sheriff. The writ, with the sheriff's return upon it, is only evidence against him, to the extent of his duty under it, and it is no part of his duty to annex the officer's name to the return

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the first day of Michaelmas Term, 1815. The writ had been regularly delivered at the sheriff's office, and the sheriff, upon being served with a rule, had returned *non est inventus*.

It was in evidence that the defendant, *Coningham*, had been in the custody of a person of the name of *Leach*, who was a known officer of the sheriff of *Middlesex*, and that he had escaped out of his custody. The officer was not called as a witness, and no warrant was given in evidence. A general notice had been served upon the defendants to produce the writ, bail bond, warrant, and all papers, documents, &c. in the original action. Upon the production of the writ, the name of *Leach* appeared indorsed upon it, but it was not proved to be the handwriting of any person connected with the sheriff or his deputies.

*Best*, serjeant, for the defendants, contended, that the plaintiff had not connected the sheriff with the officer. In actions of this kind, in order to make the sheriff responsible, the warrant should be produced. The notice to produce the warrant, served upon the sheriff, was not sufficient. The warrant was in the custody of the officer, whose peculiar defence it constituted; and it would be as absurd to call upon the officer for the writ, as upon the sheriff for the warrant. Neither was it sufficient that the arrest was made by a known officer of the sheriff, and that his name was indorsed upon the warrant. The plaintiff must go further, and shew that his name was indorsed upon the writ by the sheriff's authority or privily.

*Lens, serjeant, contra.*—The writ has been returned, and is become a record. It is evidence, therefore, of all matters contained in it. The name of the officer, indorsed upon the writ, accompanying the sheriff's return of *non est inventus*, is *prima facie* evidence that the sheriff employed him, and is a recognition of his authority to act under it.

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GIBBS, C. J.—It is the general practice to connect the sheriff and the officer by the production of the warrant. I do not say that this is the only way to make the sheriff responsible, but it is the formal way. Undoubtedly, any subsequent recognition by the sheriff would be equivalent to the production of the warrant. The notice to the sheriff to produce the warrant is not sufficient. The warrant is the authority which he makes out to his officer. It is therefore in the custody of the officer. The forms of pleading explain this. In an action against the sheriff, he justifies under his writ, and the officer protects himself under his warrant. It is, therefore, in his peculiar custody, as his means of defence. But it is said that the sheriff and the officer are connected by the indorsement on the writ. It is not so, unless the plaintiff can shew that the officer's name was indorsed upon the writ by the authority of the sheriff. The writ is only evidence against the sheriff to the extent of his duty under the writ; and it is no part of his duty to annex the name of the officer to the return. The name of the officer might have been indorsed by the plaintiff him-

1816. self or his clerk. There is no evidence against  
the sheriff.  
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REAY.

Plaintiff nonsuited.

*Lens*, serjeant, and *Minchin*, for plaintiff.

*Best*, serjeant, and *Holt*, for defendants.

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In an action of trespass against the sheriff for a wrongful act of the bailiff, it is not enough, in order to affect the sheriff, to prove that he is a general bailiff and had given a bond of indemnity to the sheriff as such, and to prove a copy of the warrant under which he entered and seized the plaintiff's goods; but the privity between the bailiff and the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution from the sheriff to the bailiff, or, at least by proving notice to produce it, so that, in case of its not being produced, secondary evidence of its contents may be let in. *Drake v. Sykes, Bart.* 7 T. R. 113.

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## NEWLAND v. BELL.

May 31.

**T**HIS was an issue out of Chancery directed to try whether the defendant, previous to a commission of bankrupt, which bore date 7th March, 1816, was a trader. He was described in the commission as a dealer in pigs and a pork butcher. The defendant, who had formerly been an officer in the army, resided near *Chichester*, and was a gentleman principally living on his own property: he rented a dwelling-house, a small garden, and three acres of meadow land. In 1814 he first took possession of the premises: there was a small pig-stye in the yard, and he built an additional stye, which he divided into two. He had seldom more than three pigs in the styes at any one time; and had never bought, in one year, a greater number than fourteen pigs. In two instances he had sold a live pig, and, when he killed a pig, he had been accustomed to dispose of a part. It was in evidence, that he had killed in one season from twelve to fourteen pigs, and had once sent a bacon hog to *Chichester* market; and that he kept and killed more than were required for his own consumption. In one instance, he told a witness that he had become a pig merchant, and that there was a great deal of money to be made by it at times.

A. (an officer of the army) retires to the country, where he rents a dwelling-house and three acres of land; buys pigs, and consumes part in his family, and sells the rest at a neighbouring market. He makes no shew as a dealer, and is proved not to have bought more than fourteen pigs in any one year.

Held, that he was a trader within the bankrupt laws.

The smallness of the profit is no consideration, and one act of buying and selling is sufficient to constitute a trader.

*Lens*, serjeant for the defendant. If this evidence be sufficient to prove the defendant a trader,



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every country gentleman who kept pigs, whether for immediate use or profit, (which latter consideration was never wholly excluded,) would be liable to the bankrupt laws. Admitting that all the pigs bought and killed were not necessary for the defendant's family, does this constitute him a trader? A man may be mistaken in his judgment, and overstock himself. The defendant kept no shop; exposed no pork to sale; made no exhibition as a trader or dealer. And it was not contended that he made any profit, much less a livelihood, by dealing in pigs.

*Best, serjeant, contra.* The evidence is, that he dealt in pigs for profit: that is the only question; he bought and sold with a view to gain. Such a man is a dealer and chapman in the language of the law.

Some of the jurymen observed, that they had known the defendant a long time, and had no conception he was a trader, or intended to subject himself to bankruptcy.

GIBBS, C. J.—The only question is, has not this gentleman, by his conduct, brought himself within the description of persons who are liable to the bankrupt laws? The defendant probably did not mean to be a trader; he might not know the law; but I take the principle to be this:—If a gentleman or farmer buy horses, sheep, or pigs, for the use of his family, and, being overstocked, sell them again, he is not a trader. In the same manner, if the defendant bought pigs with a view of

consuming them in his family, and, finding he had more than he could consume, re-sold them, alive or dead, he would not be a trader. But if he buys with a view of profit from a re-sale, he is within the bankrupt laws. In the latter case, the smallness of the profit does not signify, and one instance of buying and selling is sufficient. The fact and the question of intention are, however, for the Jury.

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v.  
BALL.

Verdict for the plaintiff.

*Best and Copley*, serjeants, and *Reader*, for the plaintiff.

*Lens, Vaughan, and Pell*, serjeants, for the defendant.

It is not easy to reconcile the present case with the case of *Stewart v. Ball*, 2 New Rep. 79. in which it was holden, that a farmer, who occasionally bought hay, corn, horses, &c. with a view to sell again for profit, did not thereby make himself a trader within the bankrupt laws. In that case, however, the acts of buying and selling were defended upon the ground, that they were incidental to the occupation of the farm. The distinctions are very nice upon this subject; and cases are

brought into discussion every day; but an attentive consideration of the words of the act will go a great way to clear the difficulty, and lead to a distribution, which in one or other of its terms will comprehend all cases of the present kind. The words of the act (21 Jac. I. c. 19. s. 2.) are as follows:—

“ Every person that uses the trade of merchandize, by way of bargaining, exchange, bartering, chevisance, or otherwise, in gross or by retail, or seeking his or her living by

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buying and selling, &c. shall be liable to be a bankrupt."

1. Now, the first observation upon this definition is, that the several words trade, merchandise, bargain, exchange, bartering, &c. are all words of the same general meaning, namely, trade and dealing; that is to say, the business and occupation of a man, in trading, for the sake of his livelihood.—The first requisite, therefore, is the act of trading: the quantity of trade is of no import. The law requires nothing but proof of the *animus mercandi*, and if expressed by a single act, it takes such act as a sample of the occupation of the man, and presumes accordingly that he is a trader. Thus, in *Holroyd v. Gwynn*, 2 Taunt. 176. the purchase of a single lot of timber was held sufficient to bring a man within the description of the law.

2. A landlord, who sells the produce of his land, or the stock which he feeds upon it, whatever his tenure may be, whether freehold, leasehold, &c. &c.; and any farmer, or occupier, under him, are not traders within the above description. It is unnecessary to say any thing with regard to agricultural produce, as the question has only arisen with respect to

the extraordinary produce of land, such as minerals, lead, coals, alum works, lime, bricks, &c.

It is evidently necessary that the owner of land should sell his produce, whatever it be. But such sale partakes nothing of the nature of an act of trade. It is not necessarily accompanied with what seems chiefly to constitute the act of trading, *i. e.* mutual credit, risk, and the fluctuation of capital. Such selling, in its proper circumstances, is the immediate conversion of the produce of the land into money: and there the dealing ends. The landholder, and his commodity, are not at sea.

3. Nor will the landholder be taken out of this exemption from the legal definition of a trader, if, in order to bring his produce into market, he be compelled to do some act, which, if principal, would be an act of trading; but which, being necessary, instrumental, and incidental, is legally considered as only a part of his act of selling, as the first owner of the produce. For example, if he buy sand, and fuel, in order to assist him in working up his bricks. If, having a fishery upon his estate, he buys whatever may be necessary in or-

der to sell the fish ; for instance, if he salt what he cannot sell fresh ; all these, and similar acts, which, if exercised *principally*, would constitute a trader, are here regarded as only incidental to the necessary sale of his produce.

4. But such act of working up, adding, altering, &c. the raw material of the land, must be according to the usual and necessary mode of enjoying the produce ; in other words, must be a mere selling, as owner of such produce. Therefore, if a landlord have a field of clay, of which he can make no other use than by working it up into bricks, and selling it, he is, as such, merely a seller of produce, and, therefore, no trader. But if another hire the same field from him, not as a farmer, who takes it as part of his farm, and who, being in the same circumstances as his landlord, works it up from the same necessity ;—but as a brickmaker ; in this case, there are all the qualities of trading, and the voluntary act of becoming a trader. The trading is here the principal act, and the land is only used as the raw material for a manufacture.

5. The distinction in all

these cases turns upon the point, whether the alleged act of trading be incidental, or principal ; be a necessary and administrative part to some act, admitted by law not to be a trading, or be absolute and primary in its nature. Such cases, therefore, are most frequently questions of intention, or of circumstances, from which intention must be deduced by evidence, and, as such, are proper for a Jury.

6. The reason upon which a landlord selling his own produce is not regarded as a trader, extends to all persons within the same analogy ; namely, to all those, who, in order to enjoy the produce of their personal labour, are compelled to the act of selling, and incidentally to the act of buying, in order to sell. For example, a fisherman, who occasionally buys fish to make up a deficiency for market. But if there be any buying of materials beyond what may be necessary to supply the personal labour, it is an act of trading. In all cases, however, it is a question of intention and circumstances.

7. It has been before observed, that the quantity of trading is totally immaterial, and the reason of this rule of law is good. For example, a

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man might buy his whole stock by one bargain; sell it immediately after by another; and might do no other act of trading until the expiration of his credit. Neither is profit necessary. Indeed, the general presumption in all such cases is, that there is *no profit*, but waste, imprudence, accident, or ignorant trading.

In some of the early decisions upon the cases, whether a landholder, selling the produce of his land, for example, brick, coal, &c. was liable to the bankrupt laws, much discussion was raised upon the nature and extent of his interest in the land. *Wells v. Parker in error*, 1 Term. Rep. 34. *Sutton v. Wheeley*, 7 East 442. But in the latter cases, the extent or duration of interest has not been thought material.

In *Ex parte Gallimore*, the Lord Chancellor observed, "It is admitted, if a person make bricks on his own estate, and sell them, he is no trader; and I cannot think there is any difference, whether he is a termor or a freeholder. For it is the same species of in-

terest, but for a shorter duration; and, therefore, the same principle must apply. If, therefore, a man only make a profit of the soil which he has as his own, and I do not know how to distinguish between an owner in fee and an owner for a term of years, my inclination is to say, that he would not be a trader within the bankrupt laws. But nice distinctions have been taken in almost every case which has occurred."

In the same case his Lordship observed, that the owner of a colliery, buying articles, and selling them again to his own pitmen, would not be a trader. Nor a fisherman, who bought occasionally fish, to make up a cargo for market, otherwise deficient. 2 Rose's Cases in Bankruptcy, 424.

But a farmer, buying and selling horses, to an extent unauthorised by his character of farmer, maybe a bankrupt, as a horse-dealer. *Ex parte Gibbs*, 2 Rose, 38. Sittings after Trinity Term, 1816.—See likewise the cases collected in Whitmarsh's Bankrupt Laws, p. 5 to 12.

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**T**HIS was an action against the defendant, the proprietor of a waggon, for the negligence and misconduct of his servant, the driver; who had driven the waggon against a cart which stood in the public street, in *Kensington*, and had forced the cart against the plaintiff's shop window, which was thereby broken. The waggon belonged to the defendant; but the horses were the property of another partner, of the name of *Dyson*. The business of a public carrier was divided between them: the defendant provided the waggon, and *Dyson* found the horses and drivers, from *London* to *Farnham*; but from *Farnham* to *Gosport*, which was the conclusion of the stage, the defendant provided horses and drivers. He had, however, no actual controul over the waggoner at the time of the accident; on the contrary, *Dyson* hired him, and paid him his wages.

*A.* and *B.* are partners in the business of public carriers; by a contract between them, *A.* finds horses and drivers for certain stages, and *B.* supplies them for the remaining stages. They are, notwithstanding this division of the concern between them, responsible for the misconduct and negligence of their drivers and servants throughout the whole distance. And it is no defence to *B.* that the servant, by whom an injury is committed, was the special servant of *A.* and hired and paid by *A.* alone.

*Best*, serjeant, for the defendant. *Elkins* is not responsible: it is his waggon, but it is neither

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drawn by his horses, nor driven by his servant. The principle of the law is, to hold the master responsible for the injury done by his servant in the course of his employ: the relation of master and servant must, therefore, subsist, or the law can raise no responsibility. It would be unjust to make one man liable for the act of another, whom he has not placed in his employment, and over whom he has no controul. If I lend a friend my carriage, and he hires a coachman to drive it, am I responsible, as the owner of the carriage, for an injury done by the driver? The action is a hard one at best, and ought not to be extended. He cited *Barton v. Hanson*, 2 Taunt. 49.

GIBBS, C. J. The action is maintainable on this principle: the waggon belongs to *Elkins*; he has the profit of the carriage. On what terms he engages with other persons to horse the waggon, we cannot tell. It is sufficient that he is found to be a partner in a common concern, and jointly interested with *Dyson* in the profits. It is of no importance how *Elkins* and *Dyson* apportion the carrying business between them. The servant is engaged to drive the waggon for *Elkins*, as well as for his immediate employer *Dyson*. Though, by the subordinate contract between the partners he is the servant of one, yet, in the contemplation of the law, and for all purposes of legal responsibility, he is in the employ of both. The case cited has no application. There may be an inferior contract, regulating the rights of the parties, and binding them to each other, which

will not extinguish or alter the general obligation which they all owe to the public.

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Verdict for the plaintiff.

*Pell*, serjeant, and *Espinasse*, for the plaintiff.

*Best*, serjeant, for the defendant.

The responsibility of the master for the acts of his servant has been extended by recent cases to a length beyond the ordinary course of practice, and which, unless the principle be duly understood, may appear contrary both to reason and the principles of general equity. The question is of very general concern, and the cases rest upon some nice distinctions, which, however subtle and remote, are perfectly consonant with the principles of legal liability; a very different thing from moral criminality.

The foundation of this branch of our law is avowedly in the maxim of the Roman Code (4 Inst. tit. 5.) *qui facit per alium facit per se*; namely, that the agency of a servant is but an instrument; and that any man having an authority over the actions of another, who either

expressly commands him to do an act, or puts him in a condition, of which such act is a result, or by the absence of a due care and controul (either previously in the choice of his servant, or immediately in the act itself) negligently suffers him to do an injury, shall be responsible for the act of his servant, as if it were the act of himself. All the cases rest upon the development of this principle. We shall here subjoin some of those main divisions into which it seems to distribute itself.

1. The first case of such responsibility is the express command of the master; and here the principle is too obvious to need an explanation.

2. The second head is, that of reasonable presumption, or, in legal terms, a general command. Whatever a servant is permitted to do in the ordinary course of his business, is equi-



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valent to this reasonable presumption and general command. Thus, if an innkeeper employ a drawer, who serves his guests with wine injurious to their health, the party injured may bring an action against the master. 1 Roll. Abr. 95. Upon the same principle, by the common law (till altered by the statute of Anne) if a servant keep his master's fire negligently, so that his neighbour's house be burnt down thereby, an action lies against the master, because this negligence occurred in his service. Otherwise, if the servant going along the street with a torch, by negligence set fire to the house of a neighbour; for there he is not in his master's immediate service, and must answer the damage personally. Noy's Max. c. 44. In all such cases, the term in our law books, general command, is equivalent to the words, the general deputation, or voluntary substitution of the servant for the master, *within the line of his particular employ*; and, therefore, all the acts of the servant within such particular line, are very properly regarded as the acts of the master.

3. The third head of such responsibility is, where the absence of a due care and con-

troul by a master, either in the previous choice of his servant, or in the immediate act itself, has occasioned an injury to another. In all such cases the master is legally as well as morally criminal for the act of his servant, and therefore becomes a subject of legal as well as of moral imputation. Thus a chemist who employs an unskilful apprentice to mix up drugs and vend in his shop, or the master of a stage coach employing a negligent driver, are responsible for the acts of their respective servants. Nor does it make any distinction in these cases, whether such injury be the effect of negligence or wilfulness in the servant, so long as it is within the scope of the master's employ. The reason of this is two-fold; in the first place, because the master, who alone could know his servant, is bound to make choice of a proper one in every respect, both as to good character, which would exclude such wilfulness; and as to skill, which would exclude such negligence.

4. According to the above definition (that the servant is the deputy of the master only within the limits in which he is employed) the master is not responsible for any act of his servant, which makes no part

or connection with his service, and which he might or would have committed without such service, such acts being contemporary only with his service, but not any result from it. For example, if my coachman drive over the leg of another man, I am responsible for the injury; but if he get off his coachbox and horsewhip a man in the street, it is his act, and not mine; it is nothing which I could foresee or prevent; it is not the result of character, or the absence of any proper quality which I ought, acting with ordinary discretion, to have required in a driver. All the cases under this exception rest upon the same distinction. The injurious act, for which the master is made responsible, must be something growing out of the particular service, and be committed *quatenus in servitio*.

5. To instance a few more cases. In Bro. Abr. tit. Trespass, pl. 435, it is said, "If my servant, without my notice, put my beasts in another's land, my servant is the trespasser, and not I; because, by the voluntary putting of the beasts there, without my assent, he gains a special property for the time, and so, to this purpose, they are his beasts." The reason

here given is an example of the subtilty of our old law-writers, who preferred a reason, however technical and remote, to one more obvious and familiar. In *Middleton v. Fowler*, Salk. 282, Holt, C. J. places the law upon its proper foundation, when he states it as a general position;—"that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him." In other words, when a servant quits sight of the object for which he was employed, and, without reference to his master's business or orders, commits from his own malice some wilful and independent act, he is no longer presumed to be acting in pursuance of his general authority as a servant, and, according to the doctrine of Lord Holt, his master is not responsible for the act which he does. Thus, in *M'Manus v. Cricket*, 1 East 106, the Court of King's Bench determined, that a master was not liable in trespass, for the wilful act of his servant, in driving his master's carriage against another; such act being done without the direction or assent of the master;—admitting, at the same time, that the master would be liable for any damage occasioned by the neg-

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ligence and unskilfulness of his servant whilst in his employ.

In the same manner, although the master of a ship is not discharged of his responsibility for the acts of his crew notwithstanding they are done under the direction of a pilot, who, by the regulations of a statute, supersedes the master for the time in the government of the ship; yet, if one of the ship's crew does a wilful act of injury to another ship, without any direction from, or privity with, the master, trespass cannot be maintained against the master, although he was on board at the time. *Boucher v. Noidstrom*, 1 Taunt. 56-8; and see the cases referred to in the argument.

So, in a later case, *Nicholson v. Mounsey*, 15 East 384, it was determined, that the captain of a sloop of war was not responsible in an action on the case, which is a material distinction, for damages done by running down another vessel; the mischief appearing to have been committed during the watch of the lieutenant, who was upon deck, and had the actual management of the sloop at the time and when the captain was not upon deck, and was not called by his duty to be there. That case, however, was determined upon this prin-

ciple, 1. That the defendant and the lieutenant were equally the servants of a superior, and stationed on board by the same authority. 2. That the defendant had no power either to appoint or dismiss his officers and crew.

6. With respect to the description of agents and servants; for whose acts the master may be responsible, there is a peculiarity in the English law, which embraces a very wide and extensive relation. In the civil law the liability was narrowed to the person standing in the relation of a *pater familias* to the wrongdoer. *Dig. lib. ix. tit. 3*. Our law extends, not only to cases where the agent is a domestic, but it throws the responsibility upon the principal, from whom the authority, of which the injury is a consequence, originally moved. Thus, where a master having employed his servant to do some act, and the servant out of idleness employed another to do it, and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, the master was held responsible. Reported from *Buller, J.* by *Eyre C. J.* in *Bush v. Steinman*, 1 B. and P. 404.

7. The general proposition, that a person shall be answerable for an injury which arises in carrying into execution that which he has employed another to do, is perhaps too large and loose; but, in the case of *Littledale v. Lord Lonsdale*, 2 H. Bl. 267—299, and in *Bush v. Steinman*, 1 B. and P. 404, the principle was carried to a great extent. In the former case, the defendant was held responsible for an injury to the plaintiff's horse, done by persons with whom he had contracted (and not merely employed as agents and servants) to work a colliery, on the ground that the colliery was the defendant's property; that it was upon his land; and that the description of persons working it could make no difference in his responsibility. In *Bush v. Steinman*, the decision was this: *A.* having a house by the road side, contracted with *B.* to repair it for a stipulated sum; *B.* contracted with *C.* to do the work; and *C.* with *D.* to furnish the materials. The servant of *D.* brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned; held, that *A.* was answerable for the damage sustained. In this case the Court

principally relied upon the case of *Littledale v. Lonsdale*. See likewise *Stone v. Cartwright*, 6 T. R. 411. *Flower v. Adam*, 2 Taunt. 314. *Payne v. Rogers*, 2 H. B. 349. *Leslie v. Pounds*, 4 Taunt. 649.

The following case will shew the extent to which a master is answerable for the act of his servant:

*DIXON v. BELL*, Trinity Term, 56 Geo. III. K. B. Westminster.—MS.

This was an action on the case for having negligently entrusted a loaded gun to a Mulatto girl of twelve years of age, who discharged it against the son and servant of the plaintiff, and severely wounded him, *per quod servitium amisit*, &c.

The defendant was a West India merchant, and had lodged with a person of the name of *Lemon*; but upon removing to another house, he sent a Mulatto girl, who was in his service, to bring away a loaded gun, with a verbal message to the master of his former lodgings, requesting him, previously to his delivering the gun to the girl, to take out the priming. The master of the lodgings examined the pan, saw no priming, and delivered the gun to the girl, with an exhortation

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to take care of it. She went into the kitchen, and seeing the plaintiff's son, a boy of nine years old, playfully presented the gun at him, saying that she would shoot him. The gun went off, and the contents were lodged in the child's face; one eye was lost, and his face much lacerated.

The *Attorney General* for the defendant, contended,—  
 1. That due care had been taken, and that the master was not responsible for the act of his servant, where the injury was so remote as in the present case. The defendant was not accused of having employed an improper servant; or having employed a proper servant improperly. 2. That the act of the Mulatto girl could not, in any sense, be regarded as an act in the course of general service. Without imputing any blame to the girl, it might be regarded, in reference to her master, as her own independent act.

Lord *Ellenborough*.—There are two questions for the Jury. The first is, whether the defendant had used a reasonable caution with respect to such an instrument in *any* hands. The second question is, whether such caution was reasonable as respected a servant of such age

and condition. Upon the first head, it was the duty of a master to take all necessary precaution with respect to a dangerous instrument; and the discharge of the gun, although the priming was gone, was certainly, in some degree, a proof that such caution was not sufficient. That this was a question for the Jury under the first head. Under the second, the sufficiency of the caution had a necessary relation to the condition and circumstances of those to whom it was applied; and what would in one case be sufficient, (as for example to a man of mature understanding,) might evidently be inadequate to another; as to a boy or a girl. The master in all cases is bound to employ proper instruments, and to use sufficient caution. When he acts by another, he is bound to the same degree of care as when acting by himself. He is legally liable for all that he negligently suffers. The possessor of an instrument of mischief must keep it from the reach of doing injury; and if he choose to remove it, he must do so with due precaution, and by a safe conveyance.

The Jury found a verdict for the plaintiff, with damages 100%.

The *Attorney General*, in the ensuing term, moved for a new trial; but the Court was unanimous in opinion with his Lordship, and a rule was refused.

*Topping and Holt*, for the plaintiff.

The *Attorney General* and *Gaselee*, for the defendant.

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ROBSON v. GODFREY and THOMAS.

1. Where work is done upon a special contract, and for estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is to be the rule of payment, as far as the special contract can be traced; and for any excess beyond it, the party is entitled to his *quantum meruit*.

2. Where work is done under a special contract, the plaintiff is not precluded from recovering under the counts for work and labour generally; unless there be something in the terms of the special agreement, which either by stipulation, or necessary intendment, prevent him from it.


**T**HIS was an action to recover the amount of a shipwright's bill. The plaintiff had repaired a vessel belonging to the defendants. It appeared there was an agreement in writing, which described the work to be done, and regulated the mode of payment. The repairs had likewise been estimated, and the expence ascertained. It was agreed, that the expence should not exceed the sum of 620*l.* and payment was to be made by 100*l.* at a fortnight after the repairs, 100*l.* at a month, 100*l.* at six weeks, and the residue by an approved bill at six months.

The action was not brought upon the special contract, and the declaration only contained counts for work and labour generally. But it was in evidence that the original plan for the repairs had been varied; that other work had been done by the defendants' order, out of the scope of the agreement, and beyond the repairs originally contemplated between the parties.

*Shepherd*, S. G. and *Puller*, for the defendants, objected—1. That the plaintiff should have declared on the special agreement as far as it extended; and, for any excess, he might have had recourse to his *quantum meruit*. 2. The contract defines the manner of payment: part is to

be paid by an approved bill of six months. Now, the time is not yet arrived when the plaintiff would be entitled to recover that bill, according to his agreement; but, by his form of declaring, he claims for a present debt; and if he obtain a verdict, he will be entitled to immediate payment. 3. Because there is some excess beyond a special agreement, or a slight deviation from the original plan, it is not, therefore, reasonable to let the whole contract loose, and to take from the defendant all the benefit of his previous stipulations.

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GIBBS, C. J.—I agree with the principle laid down by the defendants' counsel; that, up to the extent of the estimate, the plaintiff must be paid according to the estimated prices, and beyond the estimate he is to be compensated on the footing of a *quantum meruit*. But the objection is no ground of nonsuit. This point has been perplexed by cases; but I have always understood the rule to be, that unless there be something in the terms of the special agreement, which, either by express stipulation, or necessary intendment, precludes the plaintiff from recovering for work and labour generally, he is entitled, after the contract has been executed, to maintain the present form of action. It is every day's practice to bring an action for goods sold and delivered, though they have originally been ordered upon special terms of agreement. This case falls within the rule I have stated. There are stipulations in this contract which render it impossible for the plaintiff to recover on the common counts: the mode



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of payment is specifically defined ; and the time for which credit was to be given has not yet elapsed. But much of the work was performed under additional orders, independent of the special contract ; and for that portion the plaintiff may recover under the common counts. But looking to the provisions of this agreement, I am of opinion, that he cannot recover for the work and labour which were performed under the terms of the written contract.

The plaintiff had a verdict, and the damages were referred.

*Best and Vaughan*, serjeants, and *Heath*, for the plaintiff.

*Shepherd*, S. G. and *Puller*, for the defendants.

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Where a builder contracts for a particular sum, and additions are made to the original plan, the contract remains binding as far as it can be traced, and the excess only is recoverable on a *quantum meruit*. *Pepper v. Burland*, Peake, 103. Kenyon, C. J.

But if the plan is entirely abandoned, so that it is impossible to trace the contract,

and to say to what part of the work it shall be applied, in such case the workman shall be permitted to charge for the whole work done, by measure and value ; as if no contract had been made. *S. C. per Ld. Kenyon*.—See likewise *Neale and Others v. Viney*, 1 Campb. 471. *Ellis v. Hamlyn*, 3 Taunt. 52. *Guy v. Gower*, 2 Marsh. Rep. 273.

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## CORSEN v. DUBOIS.

**T**HIS was an action on a bill of exchange, to which the defendant had pleaded his bankruptcy and certificate. Having sustained the plea by the production of his certificate, the plaintiff proposed to shew that there had been a prior commission in 1802, against *Dubois* and his partner, and that he had not paid 15s. in the pound under the second commission. In order to obtain evidence of that commission, a *subpoena duces tecum* had been served upon Mr. *Davis*, the solicitor of the defendant, to produce the proceedings under it. Upon Mr. *Davis*'s examination it appeared, that the assignees of the first commission had left the papers in his custody, and he then had them in court, but hesitated to produce them.

1. Upon a *subpoena duces tecum*, a witness is bound to produce a paper which he has in his actual custody, though the legal right and property in such paper belong to another. The Court, however, in all such cases will exercise their discretion, in deciding what papers shall be produced; and under what qualifications, as respects the interest of the witness.

2. Such witness is bound to produce them, though there be a regular way prescribed by law for obtaining such documents.

*Best*, serjeant, for the defendant—The witness is not bound to produce the papers: he has not the proceedings as solicitor to the defendant in the cause; but they have been specially confided to him by the assignees, under the former commission. The plaintiff might have obtained the proceedings by adopting either of two modes. He might have called upon the assignees, who would have been bound to produce them; or, he might have petitioned the Chancellor to have had the proceedings enrolled; in which case they would have been accessible, as a record, to any party who wanted them. But a stranger, like the present

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witness, whose custody is special, cannot be permitted, even if he were willing, to do an act which might prejudice the interest of third persons. This case does not fall within the principle of *Amey v. Long*. In that case there was one way only to obtain the document wanted. Here the law points out the means.

*Lens, serjeant, contra*.—There has been much litigation on this point, and it would be convenient that the practice were settled. The plaintiff must necessarily *subpena* the person who has the custody of the proceedings. It would be idle to take any other course. We have discovered the person who has possession of the documents we want; and he is present with them in court. The objection, therefore, that we are informal, is answered.

GIBBS, C. J.—Undoubtedly the practice should be settled; and the rule, as it strikes me, ought to be this: the solicitor, who has the custody of any papers, and is regularly called upon by a *subpena duces tecum*, should produce them. I think he ought to do so, though the legal custody may belong to others. I do not say that the solicitor has an unconditional power over them, but he ought to produce them, subject to qualifications. If the production were likely to be prejudicial to the assignees, I would then intercept them. But as I cannot see any prejudice to the persons who have entrusted the solicitor with the proceedings, I think he cannot withhold them. In cases like this, the discretion of

the Judge at *Nisi Prius* will guard the interests of third parties.

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Verdict for the plaintiff.

*Lens*, serjeant, and *F. Pollock*, for the plaintiff.

*Best*, serjeant, for the defendant.

The writ of *subpoena duces tecum* is of compulsory obligation on a witness to produce papers thereby demanded, which he has in his possession, and which he has no lawful and reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness, is to judge. *Amey v. Long*, 9 East 473. It was likewise decided in the same case, that an action will lie against a party who refuses to produce a paper in his *actual* possession; and it is no defence, that the legal title to such paper is in another person, 1 Campb. 14.

But if the writing, which a witness is called upon to produce,

would have a tendency to subject him to a criminal charge, or to a penalty, or to any kind of forfeiture, he is not bound to produce it, or to answer any questions respecting it.—See stat. 46 G. 3. c. 37. But he would not be excused from producing a paper in his possession, on the ground that it might subject him to a debt, or to any suit of a civil nature.

The act of parliament in terms speaks only “of answering questions put to a witness;” but the act must necessarily be extended, by analogy, to the production of written evidence, under the same qualifications which apply to parol testimony.

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## HOUSTMAN v. THORNTON.

1. There is no fixed rule of law with regard to the time, after which a missing ship shall be reputed to be lost. It is, in all cases, a question of presumption to be governed by the circumstances of the particular case.

2. If a ship, for which the underwriters, (when a demand is made upon the policy) have paid as for a lost ship, should chance to turn up, she is to be considered as abandoned, and will belong to the underwriters.

**T**HIS was an action on a policy of insurance on a ship and her cargo, at and from *Havannah* to her port or ports of discharge in *Holland* or *Flanders*. The question was, whether the underwriters were bound to pay, on the ground of the vessel being a lost ship. It was in evidence that she was at the *Havannah*, in August 1815; that she sailed about the middle of the month on her homeward voyage, and was hailed opposite the *Moro Castle*. But she had never been heard of, either at *Havannah*, *Antwerp*, or any other place, from that time to the present. The ordinary duration of a voyage from *Havannah* to the coast of *Flanders* is about seven weeks. The question was, whether from the time which had elapsed since the ship had been last seen or heard of, it was to be presumed she was lost.

*Lens*, serjeant, for the plaintiff.—The law has not laid down any fixed time within which a ship shall be presumed to be lost. The question will always depend upon the circumstances of the individual case, and must have a reference to the

## CASES OF INSURANCE.

**THE S.S. "ALBION."** — A vessel of the  
 name and tonnage. It is a registered  
 vessel and has been in the service of the  
 company for many years. It was  
 insured for the sum of £100,000 on the 1st  
 of January, 1881, and was lost on the 1st  
 of February, 1881, in the North Sea.

**JUROR.** — A longer period of time  
 has always been deemed necessary to insure the  
 presumption that a ship is lost, and it is the duty of the  
 jury to find the fact. Eight or nine months  
 may have elapsed. There is no case in which so  
 short a reckoning has been allowed. The ship  
 may have been blown by adverse winds on the  
 coast of America, and confined there during the  
 winter months.

**GRAN. C. J.** — There is no fixed rule of law  
 upon this subject. When the circumstances are  
 laid before a Court and Jury, the presumption will  
 be governed by them. It is to be presumed that  
 this ship is lost, inasmuch as she has not been heard  
 of for nine months. If she be discovered after-  
 wards, it will be for the benefit of the under-  
 writers. She is, in fact, abandoned, and will  
 belong to them.

Verdict for the plaintiff.

*Lens and Vaughan* serjeants, and *Barnes*,  
 for the plaintiff.

*Best*, serjeant, and *Marryatt*, for the defend-  
 ant.

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**HOUSTMAN**  
v.  
**THORNTON.**

Upon this subject see *Green v. Brown*, 2 Str. 1199. and *Newby v. Reed*, 1 Park on Insurance, 85.

There is no regulation in the law of *England*, or by the usage of merchants, fixing a limited time, within which the assured may demand payment for his loss, in case no accounts arrive of the ship upon which the insurance has been effected. Indeed, the question of reasonable time is incapable of being fixed by any settled rule, and thus every case must be considered upon its peculiar circumstances.

In *Spain* and *France*, there are express regulations on the subject. 1 *Magona*, 33. By the ordinances of *Spain*, if any ship, insured on a voyage from or to the *Indies*, be not heard of within a year and a half after her departure from her port of loading, she is to be deemed lost. By the *French* ordinances, if the assured receive no news of his ship, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years, for those at a

greater distance, make his cession to the underwriters, and demand payment without being obliged to produce any certificate of her loss.—See Pothier, *Traité du contrat d'Assurance*, chap. 3. sec. 1.

Though the time of a ship's sailing is not, in general, a circumstance necessary to be communicated to the underwriters, (*Foley v. Moline*, 1 Marshall, 117.) yet, in case of a missing ship, where a loss is to be inferred from the want of intelligence, it must be proved that the vessel set sail upon the voyage mentioned in the policy. *Cohen v. Hinckley*, 2 Campb. 51. For this purpose, the production of the convey bond or of the charter-party, or a licence for the voyage insured, is *prima facie* evidence, 2 Campb. 70.

It is not necessary to shew that the vessel has not been heard of at her port of destination. It will be sufficient if no intelligence have reached this country. *Twenloy v. Orwin*, 2 Campb. 85.

But the insurer may prove affirmatively that intelligence has been received.



SITTINGS AFTER EASTER TERM AT  
GUILDHALL

Hart v. Bick.

**T**HE plaintiff and defendant had been joint assignees under a commission of bankrupts. -- A person of the name of *Billings*, who had been employed as messenger under the bankruptcy, brought an action against *Hart* and *Biggs* jointly for costs incurred in the prosecution of that commission. *Billings* obtained a judgment against both; and *Hart*, in order to prevent an execution against himself, paid the debt and costs. This was an action of contribution, to recover from the defendant a moiety of the money paid under the judgment.

A messenger under a commission of bankrupts was the assignee for the costs and expenses, and obtains a judgment against them. One of the assignees pays the debt and costs under the judgment. He has a right to an action of contribution against his co-assignee, and is not bound to shew that any funds came into his hands from the bankrupt's estate.

*Shepherd*, Solicitor General, for the defendant, contended, 1. That the plaintiff was not entitled to maintain the present action. It was admitted that *Hart* and *Biggs* were joint assignees; but unless the plaintiff could shew an account stated and adjusted, one assignee cannot maintain an action against another. The present demand was a mere *item* in the account, and the plaintiff must wait till the whole account was liquidated. This is not like the case of sureties, where, if one surety



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HART

v.

BIGGS.

pay the whole debt, contribution is due from the other. 2. No assignee can call on his co-assignee, till he has shewn that there are no effects from the bankrupt's estate. The claim of the messenger, which arises out of the bankruptcy, must be satisfied out of that fund; *Hart* even now may have in his hands effects beyond the debt claimed.

*Best*, serjeant, *contra*.—Whatever answer the defendant might have made to the original action, he has suffered a judgment to be obtained against him, and it is now too late to dispute his liability. The messenger does not speculate on the bankrupt's estate, but trusts to those who employ him.

GIBBS, C. J.—The assignees were trustees for the creditors: they employ a third person, to whom they become jointly responsible in his retainer; he sues both assignees, and recovers against both; but one pays the whole debt. I am of opinion that he may recover against his co-assignee a moiety, and is not bound to shew that such co-assignee had any funds from the bankrupt's estate in his hands.

Verdict for plaintiff.

*Best*, serjeant, and *Ross*, for the plaintiff.

*Shepherd*, S. G. and *Onslow*, serjeant, for the defendant.

The petitioning creditor is liable to the solicitor, for the expence of conducting the commission up to the choice of the assignees. *Ex parte Hartop*, 1 Rose's Cases in Bankruptcy 449. But, as between the solicitor and the messenger, there is no implied contract on the part of the former to pay him his expenses: the solicitor is not to be regarded as his principal. In *Hartop v. Jukes*, 2 Maule and Selwyn 238—240, the Court of King's Bench decided, that the solicitor was not liable, in the first instance, to the messenger, whom he nominates, for his bill of fees: that the messenger upon the opening of the commission, might ascertain who the petitioning creditor was, and that, although the solicitor was the medium through whom the messenger received his fees, that would not make him a principal.

But, as respects the assignees, and the messenger, the case is different. They have the distribution of the bankrupt's funds, with which neither the petitioning creditor nor the solicitor can intermeddle. They are directed by the statute, 5 Geo. II. c. 30. s. 25, to reim-

burse the petitioning creditor out of the first money they receive; and it is their duty, at the same time, to see that the messenger be paid. Thus, in *Ex parte Hartop*, 1 Rose 449, the Lord Chancellor determined, that it was no objection to an application by a messenger, praying that the assignees might be directed by the Court to pay him his bill of fees, that he had neglected to make a demand upon them till after a final dividend. "They ought," says his Lordship, "to have known that they were indebted to the messenger. It was their duty to pay him; and the distribution of the funds, without having done so, is their own misconduct."

In *Lingard v. Bromley*, upon a petition to the Master of the Rolls, contribution was enforced amongst assignees in bankruptcy, to reimburse a payment by one under an order, for a loss occasioned by their joint act; and the objection, that the defendant (the co-assignee) acted only for conformity, upon the representation and advice of the plaintiff, did not prevail. 1 Vezey and Beames 114—118.

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v.  
BROGS.

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June 10.

NOBLE v. ADAMS.

A. being in bad circumstances goes to *Glasgow*, and obtains goods from B. paying for them by a bill upon a house in *London*, which house he knows to be insolvent. The goods are shipped at *Leith*; the invoice and receipt made out to A., and they are afterwards delivered to a wharfinger in *London*, who receives a notice from the original vendor (B.) to hold them for him.

A. becomes a bankrupt. In trover by A. against the wharfinger for the benefit of his assignees; held that B.'s right of stoppage in transitu was gone, but that there might still be a question for the jury, whether the sale was not made under such gross circumstances of fraud as to vacate the contract altogether.


**T**ROVER to recover a quantity of goods which the plaintiff had purchased of *Cross and Co.* of *Glasgow*, in *April* 1815, and which the defendant, as agent of the vendors, had refused to deliver up. The circumstances were these: the goods were sent according to order from *Glasgow* to *London*; they were landed at the defendant's wharf, and deposited in his warehouse. On the 3d of *May* the plaintiff produced the invoice to the defendant, and demanded the goods, at the same time tendering freight and other charges. The defendant refused to deliver the goods, on the ground that *Cross and Co.* had given him notice to retain them till further orders. It appeared by the invoice that the goods were valued at 556*l.* 6*s.* and had been paid for by two bills of exchange; one of which was for the sum of 447*l.* 13*s.*, drawn at four months from the 11th of *March*; the other for the balance (108*l.* 13*s.*) at two months from the 24th of *April*. The plaintiff, at the time he demanded the goods, produced a receipt, given by the Shipping Company at *Glasgow*, in the following terms:

" *Glasgow*, 21st *April*, 1815.

" Received from Mr. *Joshua Noble* three boxes and eight bales, marked and numbered as in the margin, to be shipped at *Leith* in the *Hope*, deliverable at *Glasgow* wharf, *London*.

" Signed, &c."

For the defendant, it was contended, 1. That the goods had been obtained by fraud; 2. That *Cross* and Co. the vendors, had not lost their right of stoppage *in transitu*. It was in evidence that the bill for 447*l.* 13*s.* was an acceptance of *Outhwaite* and Co. in *London*, who were insolvent, within the knowledge of the plaintiff, at the time that he gave the bill to *Cross* and Co. It likewise appeared, that the plaintiff and *Outhwaite* had been in the habit of exchanging paper, and that the insolvency of *Outhwaite* and Co. was notorious at the time of the purchase from *Cross* and Co. The latter bill, for 108*l.* 13*s.*, did not appear to be a *bonâ fide* transaction; and there was strong ground for suspecting the plaintiff of a deliberate fraud. *Noble* had since become bankrupt, and the present action had been brought for the benefit of his estate.

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*Noble*  
 v.  
*Adams*.

*Best*, serjeant, for the plaintiff, contended, 1. That there was no pretence for a stoppage *in transitu*; *Cross* and Co. had delivered the goods to the Shipping Company at *Leith*. That the delivery was complete, and that the vendors renounced all further right of property, was apparent from the act of the Company, who had acknowledged the receipt of the goods "*from the plaintiff*." There was no connection between *Cross* and Co. and the Company at *Glasgow*. The delivery by *Cross* and Co. to them was equivalent to a delivery to *Noble*. 2. With respect to the alleged fraud, *Cross* and Co. took the bills in the course of trade. The fact of the insolvency of *Outhwaite* and Co., although within the privity of the plaintiff, could not avoid any contract which he made with the vendors.

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NORLE  
v.  
ADAMS.

How often are purchases made with accommodation paper ; but who ever objected that they were therefore void ? In almost all bankruptcies, cases of sale like the present occur ; and, supposing it was in the reach of a court of equity, a court of law was incompetent to decide with what view such contracts were made. No mercantile contract will be safe, if circumstances like these, introduced afterwards, can invalidate it.

*Shepherd*, solicitor-general, for the defendant.

1. The right of stoppage *in transitu* is not gone. The *Glasgow* Company were agents for both parties ; and the receipt, which is in terms “ from the plaintiff,” is a mere form, capable of explanation.
2. The present action is founded in fraud ; and it is a principle of law, that *ex dolo malo non oritur contractus*.

GIBBS, C. J.—I am inclined to think, that the vendors have lost their right to stop *in transitu* ; they have not taken a receipt from the *Glasgow* Company to *themselves*, which they might have done, but have suffered them to give an absolute and unconditional receipt to the plaintiff. I have doubts upon this part of the case, and will reserve the point. Upon the question of fraud, I shall tell the jury, that the mere circumstance of the plaintiff's knowing himself to be insolvent, and that the bills which he offered in payment for the goods were doubtful, does not afford evidence of that degree of fraud which will avoid a contract of sale. Undoubtedly, a purchase under such circumstances would be grossly dishonest ;

but I am not prepared to say that the contract would be void. If the jury believe that *Noble* not only knew that the bills were waste paper, but that he had contrived them for the purpose of gaining possession of these goods; that he was irremediably insolvent at the time, and had no intention of standing his ground; under such circumstances, I shall direct them that there is a degree of fraud, which will vitiate the contract, and that no property will pass to the plaintiff under it.

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*Adams.*

The jury found a verdict for the defendant.

*Best*, serjeant, and *Andrews*, for plaintiff.

*Shepherd*, solicitor-general, *Vaughan*, serjeant, and *Lawes*, for defendant.

In the ensuing term, *Best*, Serjeant, obtained a rule to shew cause why there should not be a new trial, on the ground that there was not sufficient evidence of fraud to justify the finding of the Jury.

When the case came to be argued, the Lord Chief Justice observed, that "although he had reserved the point of stoppage *in transitu*, he was of opinion, and the Court concurred with him, that there was no pretence for exercising that right. That the delivery of *Cross* and Co. to the Shipping Company at *Glasgow* was a

complete delivery; and that the Company, by the receipt which they were empowered to give, had recognised the right of property in the plaintiff."

*Shepherd* Solicitor General, and *Vaughan* Serjeant, shewed cause against the rule *nisi* for a new trial; and the Court determined, that although there was a strong presumption, there was not sufficient evidence of fraud, to avoid the transaction; and that unless the representations of *Noble* amounted to the offence of obtaining goods under false pretences, they would not take

1816. upon themselves to say that should put themselves in the  
the contract was altogether place of Noble. On a subse-  
void. The Court, therefore, quent day the assignees, by  
made the rule absolute for a their Counsel, refused to ac-  
new trial, adding, however, as cept these terms, and the rule  
a condition, that the assignees was accordingly discharged.

  
NOBLE  
v.  
ADAMS.

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SITTINGS IN TRINITY TERM, 56 GEO. III.  
AT WESTMINSTER.

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## MITCHELL and Others v. LAPAGE.

**A**SSUMPSIT for a breach of contract, in not taking a quantity of hemp which the defendant had bought of the plaintiffs, through their broker, in *March* 1815. The hemp at the time was in *Russia*, and was to be shipped from *Riga* by the *Alexander*. Mr. *Metcalf* the broker, who made the contract, had described it in the bought and sold notes in these terms:—"Bought for *George Lapage*, of *Todd, Mitchell*, and Co. thirty-eight tons of hemp, &c." The action was brought in the names of *John Mitchell*, *George Armistead*, and *P. F. Graabner*; but the old name of the firm was *Todd, Mitchell*, and Co. This firm had been dissolved in *December* 1814, when *Todd* and *James Mitchell* retired, and *John Mitchell*, one of the plaintiffs, remained, with *Armistead* and *Graabner*, the co-plaintiffs. Neither *Todd* nor *James Mitchell* had any concern with the hemp in question. The change in the firm had not been published in the *Gazette*, but was known to the clerks in the house. When *Metcalf* made the contract in *March* 1815, it was

Where the broker makes a mistake in the contract, describing, in the bought and sold notes, goods to be sold by *A.*, *B.*, and *C.*, which he believed to be the real name of the firm which employed him; which firm, in fact, from a recent alteration that the broker was not privy to, consisted of *A.*, *D.* and *E.* only. Held, that the purchaser of the goods was not at liberty to avoid the contract on this account, after having treated the contract as subsisting, upon a subsequent communication from the plaintiffs, unless he could

shew that he had been prejudiced, or had lost the benefit of a set-off.



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not known by him that any change had taken place in the firm. It was in evidence that a letter from the present plaintiffs, in the name of the new firm, had been sent to the defendant in *August* 1815, advising him of the arrival of the hemp, which had at that time fallen in price, and calling upon him to fulfil his contract; that shortly afterwards Mr. *Lapage* expressed to the broker a wish to be liberated from his bargain. He frequently spoke of the hemp which was to come by the *Alexander*; but latterly he refused to take it, upon the ground that the insertion of *Todd's* name avoided the contract.

*Lens*, serjeant, for the defendant.—The plaintiffs cannot recover upon the present contract. The bought and sold notes are in the name of the old firm. Every man has a right to select with whom he will deal. The plaintiff might choose to contract with the old firm of *Todd, Mitchell, and Co.*, and not with another firm. When the broker sent the sold note to the plaintiffs, and they discovered, as they must have done, the mistake on inspection, it was their duty to have had the bought note altered, and to have apprised the defendant of the error. The present plaintiffs never traded under the names of *Todd, Mitchell, and Co.*, the firm with which the defendant contracted; and having made a contract with one set of persons, he cannot be prejudiced by having it adopted by another.

GIBBS, C. J.—I agree with the defendant's counsel, that he cannot be prejudiced by the substitu-

tion. If the defendant could shew any inconvenience which he has sustained by the inaccuracy of the broker, it might be an answer to the present action. *Metcalf* has misdescribed the names of his principals ; and if by this mistake the defendant was induced to think that he had entered into a contract with one set of men, and not with any other ; and if, owing to the broker, he has been prejudiced, or excluded from a set-off, it would be a good defence. But the defendant has notice, not from *Todd* and Co., but expressly from the plaintiffs, of the arrival of the hemp. After that notice he confers with the broker, treating the contract as subsisting. He has notice from the new firm, and makes no objection. This is only a mistake of the broker ; and, unless the defendant shews that he has been prejudiced, the plaintiffs have a right to recover.

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MITCHELL  
and Others  
v.  
LAPAGE.

Verdict for plaintiffs.

*Best*, serjeant, and *Marryatt*, for plaintiffs.

*Lens*, serjeant, and *F. Pollock*, for defendant.

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SITTINGS AFTER TRINITY TERM, 56 GEO. III.  
AT WESTMINSTER.

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JONES v. DAVISON.

*A.* employs *B.* to get a bill discounted, and agrees to give him a sum of money beyond the legal interest; *B.* procures *C.* to discount it, who requires *B.* to indorse the bill, but takes no more than the legal interest upon the discount. *B.* then pays over to *A.* the proceeds of the bill, minus the sum which *A.* had agreed to give him for procuring the discount: Held, that in an action against *A.*, brought by the indorsee of *C.*; *A.* could not defend himself on the ground of usury between him and *B.*

THIS was an action against the defendant as the acceptor of a bill of exchange for 39*l.* 3*s.* 1*d.* The bill was drawn by *F. A. Rickards*, payable to his own order, upon, and accepted by, the defendant. It was indorsed by *Rickards* to *Duckworth*, by *Duckworth* to *Shoel*, and by *Shoel* to the plaintiff. The defence was usury. The circumstances were these:—The defendant, being in want of money, applied to *Duckworth* to raise him some upon his bill of exchange: the bill in question was accordingly drawn, which *Duckworth* promised to get discounted for 30*s.* The bill being indorsed by *Rickards* in blank, was delivered to *Duckworth* with this understanding, that he should get it discounted, giving the value of the bill (*minus* the 30*s.* which he was to take out of it) to the defendant. *Duckworth's* name was not upon the bill at this time, but he carried it to *Shoel*, who discounted it at legal interest, but required *Duckworth* to indorse it. *Shoel* afterwards parted with the bill to the present plaintiff for a good consideration.

*Vaughan*, serjeant, for the defendant, contended, that this bill was void on account of usury. It

originated in an usurious agreement, not intermediate, but accompanying the bill in its creation. *Duckworth* is a party upon the bill, who receives the usurious interest; and the defendant, who is sued, was the hand who paid it.

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*Pell*, serjeant, *contrà*.—There is no evidence that it was intended that *Duckworth* should be a party to the bill in its first formation. He undertakes, for a commission, call it extravagant if they please, to get it discounted. But this is not usury. The circumstance of his putting his name upon the bill when he passed it to *Shoel* will not make it usury, *Duckworth* did not discount, nor undertake to discount it himself. He received the full value from *Shoel*, who, having paid a good consideration, passes a legal right to the plaintiff.

GIBBS, C. J.—The construction upon the 12th of *Anne*, which avoids all usurious contracts, has been fixed and settled by many cases; but I must say I could never understand the equity of the rule which has so long obtained under this statute, that an innocent indorsee shall be prevented from recovering upon a bill of exchange which has been contaminated in its creation with usury, by means to which he is not privy, and of which, when he receives the bill, he can know nothing. I own I have serious doubts upon this construction; and if the case renders it necessary, I will reserve the point,—whether a bill of exchange can be void, except for usury committed by the parties who originally create the instrument. If the parties who create the instrument, and agree to put their names

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upon it, commit usury, it is reasonable that they should answer for the consequences. But I do not understand why the security should be avoided in the hands of one who takes it for a valid consideration, in the common course of business, and without any thing to awaken his suspicion. He cannot tell, upon looking at the outside of the bill, whether usury has been committed or not; he receives it upon the credit of the names which he sees upon the instrument, and has no other means of judging of it. Can law, and the interests of commerce, avoid a security thus taken? These are my reasons for doubting the old rule which has obtained; and I should wish, upon a fit occasion, to have it discussed again. With respect to the present case, I am of opinion, that if *Duckworth* was by the original agreement to have been a party to this bill, and to discount it, either with his own or another person's money, receiving thereout 30s. as so much of rebate from the principal sum, it will be an usurious contract; and, as the law obtains, the present plaintiff, though an innocent indorsee, cannot recover upon it. But if this be a mere agreement between the parties, that the bill should go out in its full security to the world, and that *Duckworth* (who does not appear to have been an original party) should receive a compensation of 30s. for getting it discounted, it will not then be usury, though *Duckworth*, when he procured the money from *Shoel*, indorsed it over to him, and became a party to the instrument. I say nothing as to the extravagance of the commission; but between *Duckworth* and *Shoel* it is clear there was no usury.

The Jury found that the 30s. was given as a remuneration to *Duckworth* for getting the bill discounted.

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Verdict for plaintiff.

*Pell*, serjeant, and *Heath*, for plaintiff.

*Vaughan*, serjeant, for defendant.

As the law of usury, though not resting upon more than three or four statutes, embraces a doctrine of great extent, and, as in the application of the cases to the statutes, the Courts have been compelled to take a latitude very little consonant to the precision and determination of common law, we shall endeavour, as far as the limits of a note permit us, to explain and condense the law upon this head, and more particularly with respect to those cases of practice which are of every day's occurrence at *Nisi Prius*; and we are the more disposed to this, as there is no treatise upon usury sufficiently precise and certain for practice. There is a wide difference (and it is to be lamented that it is not better remembered) between legal definition and legal discussion.

But before we enter into this

inquiry, it may not be impertinent to correct an error into which the writers upon this subject have fallen, that of deducing our law of usury from the Roman law. It has no correspondence with it either in its doctrine or progress. It will be sufficient to refer the reader, to satisfy him upon this head, to *Dig. Jur. Civ. lib. 3. tit. 15.*

The statute upon which the present law of usury rests is 12 Anne, c. 16., and those parts of the statutes, 37 Hen. VIII. c. 9. and 13 Eliz. c. 8., which, not being repealed, are frequently called in to explain and enlarge the terms employed. Under these statutes we shall briefly consider, 1st, What contracts are usurious. 2d, How usury affects the validity of a contract. 3d, The penalties of usury.

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## I.—Of Usury in General.

1.—Usury can only attach to a loan of a certain kind, to interest of a certain quality, accompanied by certain motives.

2.—The loan must be a loan, properly so called, *i. e.* a temporary letting for profit of the use of money, goods, &c. to be returned to the lender. It is this quality of its being returnable that constitutes a loan, and thereby excludes from usury all contracts including risks or contingency. Such contracts may indeed be unconscionable, and as such be matter of relief in courts of equity, but not as usury in courts of law.

3.—The quality of the interest to constitute usury must be, that it exceeds the rate allowed in the statute of Anne, in the country in which the contract is made, and be not within the privileges or exemptions granted by statute to particular corporate companies. The rate of interest in this country is *5l. per centum*. In Ireland, *America*, *Turkey*, and other countries, *6l. 8l.* and *12l. per centum*, all which therefore are allowed by our law, upon contracts made in those countries. *Eikins v. East India*

*Company*, 1 P. W. 395. 2 Black. Com. 464. *Bodily v. Bellamy*, 2 Burr. 1094. 1 Black. Rep. 267. *Auriol v. Thomas*, 2 T. R. 52. The corporations privileged to take interest beyond the statute of Anne are the Bank of England and the South Sea Company. 3 Geo. I. c. 8. § 9. 3 Geo. I. c. 9. § 16. Beyond these exemptions, the statute 12 Anne c. 16. says, "No person shall take, directly or indirectly, for the loan of money, &c. above the value of *5l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or less sum, or for a longer or shorter time."

4.—The quality of the intention, in order to constitute usury, must be, that it is wilful, or, in the words of the statute, "a corrupt agreement, and not upon a just and true intent." Hence, where more than the allowed rate of interest was reserved in the security by the mistake of the person who drew it, and contrary to the intent of the party, it was decided not to be usury; usury being a penal act, and no man being criminal by mistake. *Nevison v. Whitley*, Cro. Car. 501. *Booth v. Cook*, Freem. 264. *Buckler v. Millard*, 2 Ventris 107.

Indeed the very words of the

statute, "directly or indirectly, or by any shift, or by any deceitful way or means," seem to look straightly to the intentions of the parties; and it is accordingly upon these words that the Courts now exercise their discretion of examining what is the real substance of the transaction, and not what is the colour and form.

5. Therefore, all loans, properly so called, upon which more interest is taken than is allowed by the statute, and which interest is taken wilfully and corruptly, (*i. e.* with a usurious intent, no matter in what shape,) are usurious contracts.

6. But it being the intention of law, whilst protecting from usury, not to endanger or impair contracts, necessary to commercial dealing, and common in the intercourse of men, the words of the statute do not apply to cases where the principal and interest are put in hazard upon a contingency, and where there is a risk that the lender may have less than his principal. The reason is, because such contingency is the main characteristic of contracts of trade; and therefore, taking such advance of money out of the form of a loan, it renders it a new contract; and much mischief would ensue if

such contracts could be shaken; the Court, however, still exercising its discretion, with the assistance of a Jury, whether the contingency be good and *bonâ fide*, or a mere shift to elude the statute. Now the main qualities of such contingencies must be two:—1st, they must be lawful; and, 2d, being fair and reasonable, must rebut the presumption, that they are only covers for usury. Within this description such contingencies are not usurious, *Martin v. Abdee*, Show, 8. *Chesterfield v. Jansen*, 1 Atk. 301. and the cases there cited.

7. But though contingencies being real, and of good faith, whether as wagers against events, or mercantile bargains, are not within the statutes against usury, yet the mere circumstance of a contract; having the form of such contingency, will not exempt it from the scrutiny of the Court, who, under the words of the statute "directly or indirectly, or by shift and contrivance," are bound to exercise a judgment, whether such be a real contingency, or a shift and device to cover usury. Thus in *Reynolds v. Clayton*, 5 Co. 70. where the contingency on which the greater interest was received, was that the son of

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the contract was usurious, *Marsh v. Martindale*, 3 B. and P. 151.

10. But beyond this usage and custom of trade, if a lender, having some function, office, or mere employ, with respect to the borrower, shall reserve to himself, at the time of such loan, a fair compensation for his discharge of duties, such compensation will not be usurious; subject, however, like all similar cases, to the judgment of the Court, whether such extra allowance be not a shift. Thus, if a man lend money to another, upon condition of being his receiver, and, in the contract of the loan, stipulates to receive over and above the interest a fair compensation for his trouble: this is not usury. But where the receiver of the rents and profits of an estate, under a deed, in order to secure himself the payment of interest on a loan of money, reserved to himself a payment of 40*l.* per annum over and above the interest, it was held usurious. *Scott v. Brest*, 2 T. R. 238. In order to support a charge of usury, under such circumstances, it ought to appear clearly that the payment stipulated for, was either colourable and frivolous in its nature, or excessive in its

amount. With respect to the excess of compensation, it depends upon the nature of the employment: it is, of course, a question for the Court and Jury, whether it be a fair equivalent, or a cover for usury. See *Carstairs v. Stein*, *ante*. Thus, an indenture, assigning to the plaintiffs a contract for the purchase of timber, upon certain trusts, for securing to themselves out of the proceeds the repayment of the purchase money advanced by them, and also of a certain balance before due to them, together with interest thereon, at 5 *per cent.* up to the time of payment; and also the sum of 200*l.* as compensation for the trouble they might be put to; and also all cost, charges, &c. which they might incur on account of the premises, was held by *K. B.* not to be an usurious agreement upon the face of it; that it was not necessarily to be intended as a colourable reservation of further interest beyond the legal interest, but as a compensation for trouble, &c.; neither was it so excessive as to be intended usurious upon that account, *Palmer v. Baker*, 1 Maule and Selwyn, 56.

11. No inequality of price, though a ground for suspecting usury, and of relief in a Court

of Equity, in a very gross and flagrant case, is an offence within these statutes: as if land worth 60*l.* per annum be purchased at 20*l.* per annum.

12. With respect to the exorbitancy of price, another frequent shift of usury, it has been holden, that where, upon an application for a loan of money, the person applied to offered to advance part in money and part in goods, and the bargain was finally concluded by advancing the whole in goods, which were imposed upon the borrower at more than their value, such contract was a loan under colour of a sale of goods. *Low v. Waller*, 2 Doug. 735. In that case Lord Mansfield observes, "that the most usual form of usury was a pretended sale of goods; and that, if it was not the intention of the parties to buy and sell, but to borrow and lend; and if the contract was in truth for a loan of money, it would be usury, though under the mask of a treaty for the sale of goods." So it is in discounting a bill, if the party discounting gives goods in part which are charged beyond their value.

The loan of money produced by the sale of stock, on an agreement that the borrower

shall replace the stock on a certain day, or repay the money on a subsequent day, with such interest in the mean time as the stock itself would have produced, is not usurious, though the interest exceed 5 *per cent.*; unless the transaction be colourable, and a mere device to obtain more than legal interest, *Tate v. Wellings*, 3 T. R. 581. *Sanders v. Kentish*, 8 T. R. 162. See likewise *Maddocks v. Rumball*, 8 E. R. 304. But if the lender oblige the borrower to take stock at a rate exceeding the market price, it is usury, 1 Esp. N. P. 11. But, where *A.* having a vested interest in stock, which he cannot transfer till a future day, sells his interest in the principal and accruing dividends, to *B.* at a rate much below the current price, this bargain is not usurious, 5 Esp. 164. Yet, where money was advanced upon the security of *omnium*, which was to be taken back by the borrower at a fixed advance of price at a day certain, and the difference in the price exceeded the rate of 5 *per cent.* for the period, during which the borrower was to retain the money, the transaction was deemed usurious. *Smedley v. Roberts*, 2 Campb. 607.

13. The discount of a bill

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of exchange is a frequent cover for usury; and the rules with respect to such dealings are these:—It is usurious, (as we have pointed out,) to substitute goods for money at an excessive value, in discounting a bill of exchange; but it is otherwise where the goods are taken at an ascertained price, 1 Esp. N. P. 40. And, in such cases, the borrower, who sets up the defence of usury, need not disprove the value; but it lies upon the lender to shew that the goods were reasonably worth the price fixed upon them, 2 Campb. 375. But, where the plaintiff refused to discount a bill unless the indorser would take part in goods at a given price, and the latter readily acceded to the proposal, saying, that he thought he could make a profit of them, it is to be presumed that the goods were charged beneath their value; and the defendant must prove the contrary if he would impeach the transaction as usurious, 2 Campb. 553. So, an exorbitant discount paid to the acceptor, to induce him to pay the bill before it is due, is not usury. *Barclay v. Walmsley*, 4 East 57. *Mathews v. Griffiths*, 1 B. and P. 153, n.

A man may take a bill of exchange to market, and sell

it (if there be no shift or decree to cover a discount) for any price which he can obtain for it; and though the price which he obtains bear no proportion to its value, (if it had been cashed upon the legal terms of discount) the purchaser, nevertheless, would not be guilty of usury: it might be otherwise if the seller indorsed the bill, and remained liable to be sued upon it. It would then be for the consideration of a Jury, whether the bargain and sale of the bill was not a shift for a loan: for it cannot be too often repeated, that, to constitute usury, there must either be a direct loan, and a taking of more than legal interest for the forbearance of payment; or there must be some device for the purpose of concealing or evading the appearance of a loan and forbearance, when, in truth, the transaction was a loan, 4 E. R. 57.

A charge of seven and sixpence *per cent.* for commission, by a discounter of bills, who is put to no expense, or considerable degree of trouble, is usurious, 1 Campb. 445; and see *Carstairs v. Stein*, 4 Maule and Selw. 194. But, where accommodation bills were drawn and accepted, upon an understanding that a broker should be paid 10s. *per cent.* for raising

money upon them, it was holden, that they were not void in the hands of an innocent indorsee, who advanced the money at legal discount; though the broker was punishable by the 12th of Ann. for taking such exorbitant commission. The principle of the decision was this: that the broker did not advance the money, nor was his name upon the bills, and legal interest only was paid for the discount.

14. Where a factor advances money for goods, and takes legal interest for his advances, if he stipulates for a higher commission upon his purchases, than he would have been contented to charge had he not furnished the money, the transaction is usurious, 2 Campb. 318. So, if the borrower of money give a bond for the principal and interest, at 5 per cent., and covenant also at the same time to pay to the lender a certain portion of the profits of a trade, carried on by him in partnership with another person, this is an usurious contract: but a memorandum indorsed on a bond, which was conditioned for the payment of 100*l.* by quarterly payments of 5*l.* each, and interest at 5 per cent., "that at the end of each year the interest due should be added to the prin-

cipal, and then, that the 20*l.* received in the course of the year was to be deducted, and the balance to remain as principal," was held not to be usurious. *Le Grange v. Hamilton*, 4 T. R. 613.

15. Lastly, upon this head; if the form of the security import a loan, it may, in some degree, contribute towards making the contract usurious: but the substance of the transaction is to be principally regarded, against which expressions in the instrument, which can only with strict propriety be applied to a loan, have but little weight. The subsequent acts of the parties may likewise be a material evidence of the intention, unless properly cleared up and explained, 2 Black. Rep. 864. And every circumstance by which a contract is assimilated to a loan, bears the aspect of corruption, and has a tendency to reveal the *malu fides* of an usurious contract. But the question whether the contract is in substance a loan, disguised in a shape to evade the law, or a *bonu fide* contract of another species, belongs to the decision of the Jury; and, in *Chesterfield v. Jansen*, the Master of the Rolls observed, that, whether an agreement was usurious or not might be

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determined two ways—1. On the verdict of a Jury, on a plea of the corrupt agreement. 2. By the Court's exercising their own judgment on the particular circumstances of the case; as in *Roberts v. Tremayne*, Cro. Jac. 307. See likewise *Carstairs v. Stein*, 4 Maule and Selwyn, 194.

### II.—*What Contracts Usury avoids.*

1. The statute 9th Anne, c. 16. has three branches: the first has already been explained; the second branch is, that all bonds, contracts, and assurances whatsoever, whereupon or whereby there shall be reserved, or taken above the rate of 5 per cent. shall be utterly void; the third branch inflicts the penalty. The whole of the second branch has for its object the validity of the security. In considering how far usury avoids the contract, the chief points are, what contracts and securities are avoided by usurious dealings, and between what persons.

2. Now as such securities are made voidable by statute, so the words of the statute are the description and condition of the invalidity, that is to say, those securities only are

void, which fall within the terms of the statute. The words of the statute are "all bonds, contracts, and assurances whatsoever, whereupon and whereby shall be reserved or taken above the rate of 5*l.* in the hundred." As to the first part of the description, the word bonds and contracts require no explanation: the words assurances comprehend notes, bills of exchange, &c. But a main distinction under this head, and which has let in many mischiefs, is, that none of the above words comprehend a judgment; a judgment not being a thing of contract, but the act of law *in invitum*. Hence, to *scire facias* on a judgment usury cannot be pleaded: as a remedy, the Court may be moved to vacate the judgment; but in the exercise of this discretion, the Court, having assumed it only for the necessity of meeting the perverse ingenuity of usurers through all their shifts, will act with great caution; judgments being, from their general nature, such as to conclude Courts of law. Where, however, it is a judgment by confession, entered up in pursuance of a warrant of attorney, the Court, if the fact of usury be not controverted, will set it aside; but, where there are

controverted facts, the Court will direct an issue to try the usury. *Cook v. Jones*, Cowp. 737.

But where usurious securities have been acted on, and the money partly paid by the borrower, the Court will not set aside a judgment and execution, but upon the terms of the defendant repaying the principal and legal interest. *Hindle v. O'Brien*, 1 Taunt. 413.

3. The second part of the above description of invalid usurious securities contains the circumstances that make them void; "that there shall be reserved or taken above the rate of five pounds in the hundred." Now, the manifest construction of these words is in the *past* sense, *i. e.* that such usury has been reserved or taken upon them, either by an agreement previous to the making, or at the time of making such security. For if the usury be taken by an after act, it of course belongs to that after act, and is not reserved on the security. It makes no part of such security. The usury, in the words of the statute, is something which taints and corrupts the security at the time of making it.—It comes illegitimate into the world, and this disability follows it, with

a legal disqualification, through all its stages. It is *nullius filius*; it comes into the world with no rights; and goes through it in the same condition.

4. Any thing, however, subsequent to the contract, cannot avoid the security.—The usury, or agreement for usury, as above said, must precede the contract, and make a part of it. Hence, if a security be given for the principal and legal interest, and the holder afterwards take more than the legal interest, such taking would be usury in the *person*, but is not usury in the contract. For the same reason, any arbitrary remuneration being afterwards given will not avoid the security. Thus, in *Lowe v. Waller*, 2 Dougl. 735, the Court of K. B. held, that a bill of exchange, given upon an usurious consideration, was void even in the hands of an indorsee for a valuable consideration, without notice of the usury: and this case has always since been considered the law upon the subject; but where there was no usury in the inception of the bill, a subsequent indorsement for an usurious consideration was held not to avoid it in the hands of an innocent holder. *Parr v. Eliason*, 1 East 92. *Cardwell v. Martin*, 9 East 191. See

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likewise 1 Saund. 295, where the old cases on this point are collected.

5. Therefore, as to the persons between whom such securities (having usury in their inception) are void, they are void in all hands; for being bad titles they give nothing. In a word, as to their condition as securities, they are within the analogy of bills of exchange on bad stamps.

6. But as this circumstance, *i. e.* the invalidity of usurious securities in innocent hands, unnecessarily falls hard upon such parties, the courts of law, in order to preserve the equity of the case, will proceed upon very nice distinctions in avoiding securities in such hands; and will eagerly avail themselves of every incidental circumstance, to put the original usury out of the security. Thus, where *A.*, for an usurious consideration, gave his promissory note to *B.*, who transferred it to *C.* for a valuable consideration, without notice of the usury, and afterwards *A.* gave to *C.* a bond for the amount, it was held not to be usury. *Cuthbert v. Haley*, 8 T. R. 390. But if *A.* had given *B.* his bond on consideration of such note, it would have been within the statute. So, a *bonâ fide* debt is not de-

stroyed by being mingled with an usurious contract relating to it. *Gray v. Fowler*, 1 H. B. 462. And, after usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is binding. *Barnes v. Hedley*, 2 Taunt. 184. The reason is, that though the first contract was void by usury, yet as the debt still subsisted, a new contract without usury was good.

6. In the same manner intermediate usury, in the discount of bills of exchange good in their inception, does not affect the bills themselves. The person who takes the usury may incur the penalty; but the bill is good in the hands of an innocent holder. *Daniel v. Cartony*, 1 Esp. 274. See likewise *Turner v. Holme*, 4 Esp. 11. But where a bill was drawn for the purpose of effecting an usurious contract between the acceptor and a stranger, who undertook to discount it, the bill was holden to be void, though the drawer was not privy to such contract. *Young v. Wright*, 1 Campb. 131. In which cases Lord Ellenborough, recognizing the authority of *Lowe v. Waller*, says, "That where there is a corrupt agreement that a bill should be dis-

counted at usurious interest, it is vitiated, into whatever hands it might afterwards come." But, where a bond was given for the performance of an usurious contract, which was afterwards cancelled by the consent of the parties, and a fresh bond taken for the principal and interest, deducting the payments illegally made on the former contract, such second bond was held to be valid. *Wright v. Wheeler*, 1 Campb. 165 n. In the same manner, where the acceptor of a bill of exchange, drawn in pursuance of an usurious contract, accepted a second bill for the purpose of raising money to take up the former, and the second bill was discounted by a *bonâ fide* indorsee at the legal rate of interest, the second bill was held not to be affected by the usury which contaminated the first. *Dagnal v. Wyke*, 2 Campb. 33.

7. If a man indebted to another in a *bonâ fide* debt, makes a contract with his creditor, on which he stipulates to pay usurious interest, although the contract be void, it does not destroy the original debt. *Gray v. Fowler*, *ante*. And it has long been acknowledged in courts of equity, that, notwithstanding usurious securities have been given, the money

lent is a debt in conscience, and ought to be repaid with legal interest. And the Court will not relieve against usurious contracts, unless the debtor pay the principal and legal interest. 2 Vesey 567. 2 Bro. Ch. Ca. 649. The ground of the practice in the courts of equity is, not that they consider the defendant as entitled to the money, but because, unless the complainant waves the penalties of the statutes, and, amongst them, the forfeiture of the money lent, the defendant could not answer without criminating himself, which a court of equity will not compel him to do. See likewise, *Fitzroy v. Gwillim*, 1 T. R. 153, where in trover for goods, which had been pledged for money advanced on an usurious contract, Lord Mansfield held, that it was necessary to prove a previous tender of the money actually due.

### III.—Of the Penalty.

With respect to the third branch of the statute, the penalty, very few observations will be sufficient. The statutes of usury, being penal, are construed strictly; and the act of usury, in order to fall within the terms, must be complete. Hence it follows, (and it has been so decided in many cases)

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DAVISON.

that as the penalty is not incurred until more than legal interest is *actually received*, the time of bringing an action for the penalty (which is one year after the offence committed by 31 Eliz. c. 5. s. 5.) begins from the receipt of the usurious interest, and not from the *making* of the contract; unless more than legal interest be received at the time of the contract. Doug. 235. 3 Wils. 261. And, as we have before shewn, that there may be usury in the person, and not in the security; the security remaining good, and the usury being subsequent; so the person may be subject to the penalties, whilst the security (the occasion and means of the usury)

may be valid; and, on the other hand, the security may be illegal and void by the statute, whilst the party may not be subject to the penalty of it. For if a man contract for more interest than the statute allows, and afterwards takes no more than legal interest, the security indeed is void; but the penalty is not incurred. And herein agree all the cases, ancient and modern. *Abraham v. Bunn*, 4 Barr. 2253. *Floyer v. Edwards*, Cowp. 114. *Fisher v. Beasley*, Dougl. 237. See likewise Williams' Saunders 295, where many of the old cases are collected, and the pleadings in the action for usury explained.

1816.

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FIRST SITTINGS AFTER TRINITY TERM, 56 GEO. III.  
IN LONDON.

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SIMPSON v. BLISS.

July 5.

**T**HIS was an action for money had and received. The plaintiff being at *Epsom* races in 1813, laid a bet of fifteen guineas with a Captain *B.* upon a horse which was to run. The defendant, who was a training groom and standing by, called the plaintiff aside, and told him, "You had better double the bet, for that horse will certainly win." The plaintiff then betted twenty-five guineas, and asked the defendant to take half of it with him; the defendant said he would not take half, but he would "go ten guineas." The plaintiff agreed to this proposal, and the horse won. Shortly after the race the defendant asked the plaintiff to pay him his ten guineas, as he was obliged to go to *Newmarket* that day. The custom at *Epsom* races was not to pay the bet upon the ground, but to settle at *Tattersall's* next morning. The plaintiff paid him the ten guineas, and the next morning Captain *B.* shot himself; the plaintiff never obtained the original bet, and brought the present action to recover the ten guineas which he had paid the defendant.

*A.* lays a wager of 25 guineas with *B.* upon the event of a horse race, and *C.* takes the risk of 10 guineas (part of the 25) as his share of it. *A.* wins the wager, but before he receives the money from *B.* he pays *C.* 10 guineas, as his portion of the bet. *B.* never paid the wager to *A.*, and all hope of obtaining it was lost. Held, that *A.* was entitled, notwithstanding the statutes of gaming, to maintain an action of money had and received against *C.* for the 10 guineas which he had paid him.

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SIMPSON

v.

BLISS.

*Blossett*, serjeant, objected, that this action could not be maintained, as it arose out of a gaming transaction : he cited 9 Anne, c. 14. § 2. 13 Geo. II. c. 19.

*Best*, serjeant, *contra*.—This was not a bet upon a horse race ; it was one degree removed. If it had been an action against Captain *B.* the objection might have been good : he cited *Petrie v. Hannay*, 3 T. R. 418.

GIBBS, C. J.—This is a nice point, and I will give the defendant's counsel liberty to move, if he desires it ; but I think the plaintiff has a right to recover, on the ground that the consideration failed upon which he paid the money. The money was paid by the plaintiff to the defendant, upon the supposition that he should receive it back from Captain *B.* I am of opinion, therefore, that the statutes of gaming do not apply.

*Best*, serjeant, and *Comyn*, for plaintiff.

*Blossett*, serjeant, for defendant.

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Vide *Petrie v. Hannay*, 3 T. R. 418. *M'Allester v. Haden*, 2 Campbell, 438 ; and Selwyn's Nisi Prius, title Wager, 1238, where the cases are collected. This case was not afterwards moved.

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ADJOURNED SITTINGS AFTER TRINITY TERM,  
AT WESTMINSTER, 56 GEO. III. 1816.

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DAVIS v. LIVING and Others.

July 6.

**T**HIS was an action against the assignees and messenger under a commission of bankrupt against *Davis* the elder. The plaintiff had succeeded to his father's business, and lived in a shop which had been taken in his father's name; but he carried on trade in his own name. The father was a bankrupt, and had not obtained his certificate. The assignees under his commission, suspecting that the goods in the plaintiff's shop belonged to the father, and that the son was only a colourable owner, seized them under the commission against the father; and the present action was brought by the son for the trespass. It was proved on the part of the plaintiff, that one of the assignees was present with the messenger when the goods were taken; but the witness did not know the messenger's name, and could not swear that he was one of the defendants.

1. In an action of tort against several, if there be evidence against some only, and none against others, it is discretionary with the Judge at *Nisi Prius*, whether he will direct the acquittal of such defendants, against whom there is no evidence, at the close of the plaintiff's case, for the purpose of making them witnesses for the co-defendants. But such an intermediate acquittal is not a matter which the defendants' counsel can claim of right.

*Best*, serjeant, insisted, that all the defendants should be acquitted, except the assignee, who was

are supplied in the name of his son, but principally upon the father's guarantee: Held, that his assignees were liable to an action of trespass at the suit of the son, for seizing them as the goods of the bankrupt.

2. An uncertificated bankrupt hires a shop; goods

1816.

DAVIS  
v.LIVING and  
Others.

proved to have directed and made the seizure: this, he stated, was for the purpose of making the messenger a witness for the other defendant.

GIBBS, C. J.—I do not think I am called upon to direct the Jury to acquit them in this state of the cause. It is not a matter of right which the defendant's counsel can claim; it is discretionary with the Judge. And were I, in this stage of the proceedings, to direct the Jury to acquit the messenger who is joined as defendant, I am not certain that, when acquitted, and called as witness, he might not prove himself a trespasser.

It appeared in the course of the plaintiff's case, that *Richard Davis*, the father, had taken the shop in his own name; that he had brought with him the old customers from the shop in which he carried on trade when he became a bankrupt; that he lived in the shop with his son; that he ordered and selected the goods, though the purchases were made in the name of his son, and credit was alone given to his son; but, in one or two instances, the father had guaranteed the payment.

*Best*, serjeant, contended, that these were circumstances, from which the Jury might collect that the plaintiff had only a colourable title; and that the property seized was virtually the bankrupt's property.

GIBBS, C. J.—It is a hard rule of law upon persons in the condition of an uncertificated bank-

rupt, that the assignees should be authorized to seize goods in his possession, and divide them amongst his creditors, although such goods have been subsequently acquired, upon his own credit, from persons who have chosen to run the risk of trusting him. But, in the present case, whoever owned the shop, the goods were supplied upon the credit of the plaintiff; and, admitting that the father guaranteed payment to the persons who supplied the goods, he could not thereby acquire any property in them, of which the assignees can possess themselves.

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DAVIS  
v.  
LIVING and  
Others.

Verdict for the plaintiff.

*Lens* serjeant, and *Comyn*, for the plaintiff.

*Best* and *Vaughan*, serjeants, for the defendants.

1816.

July 8.

TOWNSEND and Others v. INGLIS, REED,  
IRVINE, and Co.

A. is employed by B. & Co. as their broker. He sells goods the property of his principals, lying in the London Docks, to C., and draws a bill of exchange in his own name, which C. accepts for the amount, and pays. A. becomes a bankrupt; B. and Co. disavow the transaction, and call upon C. for payment; C. refuses to pay, alleging that he had already paid the broker, and brings trover for the goods against B. and Co., and the Treasurer of the London Docks. Held, that, inasmuch as B. and Co.

had suffered their broker, upon some occasions, to draw bills in his own name, without mention of them, as his principals, they were bound by the payment which had been made to him by C. in the present case: that the action well lay against B. and Co. but that the Treasurer of the Dock Company was entitled to an acquittal.

**T**HIS was an action of trover, brought to recover the value of nine casks of hare skins. Taylor and Co. were employed by Reed, Irvine, and Co. as their brokers. On the 27th of December, 1814, they sold to the plaintiffs, on account of Reed, Irvine, and Co. nine casks of hare skins, at 30s. per dozen, then in bond in the London Docks, payable by a bill of four months; or two and a half per cent. discount for money; prompt, fourteen days. On the 7th of January, 1815, Taylor obtained the delivery note, for the purpose of having the skins numbered, and to ascertain the sum for which the bill was to be drawn. The note was in these words:—


“ London, 7th of January, 1815.

“ To the Superintendent of the London Docks; please to weigh, deliver, transfer, or re-house, to the order of Messrs. Townsend and Co. the under-mentioned

goods; they paying charges to the 10th instant.

“ Signed for *Reed, Irvine, and Co.*

“ B. FREELAND.”

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 TOWNSEND  
 and Others,  
 v.  
 INGLES.

A bill of parcels was then made out, in the usual form, to the plaintiffs; but the skins were not sorted until the 9th of *February*. *Taylor and Co.* then drew a bill in their own names, and payable to their own order, upon the plaintiffs, for the price of the skins. The plaintiffs accepted the bill, which bore date the 10th of *January*, being the expiration of the prompt, and paid it when it became due. *Taylor and Co.* discounted the bill, applied the proceeds to their own use, and became bankrupts on the first of *March* following. *Reed and Co.* then disavowed the act of the brokers, and countermanded the delivery of the goods. The skins continued in the docks till *September* 1815, when they were delivered by the Company to the order of *Reed and Co.* The plaintiffs did not make a formal demand of the Company till *January* 1816.

It was in evidence that *Taylor and Co.*, in several instances during the course of their dealings with *Reed, Irvine, and Co.*, had drawn bills in their own names for goods which they had sold on their account; that they sometimes indorsed the bills over to their principals immediately upon their being accepted; at other times, they kept them till their maturity, and paid the money at the expiration of the time.



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TOWNSEND  
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v.

INGLIS.

*Best* and *Bosanquet*, serjeants, for the defendants, made two points:—1. It is admitted that *Reed* and Co. have not been paid for these skins; the broker alone has received the money, who was known to the plaintiffs to be acting as an agent. The contract disclosed the name of the principals; the plaintiffs, therefore, should have gone to them; they acted incautiously in giving the bill to the broker without the express consent of the principals. Where the agent acts as a principal, the purchaser who deals with him is safe in paying him; but, where he is a known agent, if the purchaser make the payment personally and expressly to the broker, whose authority extends only to sale, and not to receive payment, he acts at his own risk.—2. Mr. *Inglis*, the treasurer of the Dock Company, is entitled to an acquittal: at the time of the formal demand of the goods, they had been delivered out to the order of *Reed* and Co. near four months. They had never been entered in the name of the plaintiffs in the dock books; the sale as between the plaintiffs and *Reed* and Co., might be complete, but the Dock Company had not, by any act of their own, attorned to the transfer: they had not, therefore, been guilty of a conversion.

*Lens*, serjeant, *contra*.—With respect to the first question, it is in evidence that *Reed* and Co. had authorized the broker to draw bills and receive payments in many instances. He had made him his agent with this large authority, and must incur the risk of the credit he gave him. With regard to the second objection; the Dock Company, by

the delivery of skins, in *September* 1815, to the order of *Reed, Irvine, and Co.*, which skins, by the contract of sale and payment, were at that time the property of the plaintiffs, had been guilty of a conversion. They are bound to a knowledge of the rights of the parties whose property they have in their custody, and assume to dispose of.

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 and Others.

GIBBS, C. J.—The defendants contend that, as the plaintiffs have paid the broker, and not them, they are entitled to the skins. The plaintiffs rest their case upon this ground; that, in paying the broker, however unusual that practice may be, they have paid an agent who was acting in a course of dealing established between himself and the defendants, and whose authority extended to draw bills in his own name, and to receive payment. I think there is evidence for the Jury to collect that *Taylor and Co.* had this authority from their principals. I am likewise of opinion that the treasurer of the Dock Company is not answerable. Though the skins were the property of the plaintiffs from the completion of the bargain, the Company had made no transfer, and had no notice of their possessory title, when they delivered the skins to *Reed and Co.* in *September*. Mr. *Inglis*, therefore, is entitled to a verdict.

The Jury found a verdict for the plaintiffs against *Reed, Irvine, and Co.*; and acquitted the treasurer, Mr. *Inglis*.

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INGLIS  
and Others.*Lens and Vaughan, serjeants, and Marryatt, for  
the plaintiffs.**Best and Bosanquet, serjeants, for the defend-  
ants.*

See the London Dock Act,  
39 and 40 G. 3. c. 47. s. 151.  
See likewise, *Favens v. Ben-  
nett*, 11 East 36. *Pickering  
v. Busk*, 15 East 38. *Shipley*

*v. Kymer*, 1 Maule and Selw.  
484. *Whitehead v. Tuckett*,  
15 East 400.; and *Fenn v.  
Harrison*, 3 T. R. 757.

1816.

## DURRELL and Another v. BEDERLEY.

**T**HIS was an action on a policy of insurance on the ship *Hazard*, which had letters of marque as a privateer, from the 6th of *March* to the 6th of *May* inclusive, during the cruise against the enemies of *Great Britain*, in sea and port, &c. with the usual terms. The policy had been effected by Mr. *Willis*, the broker; and bore date the 24th of *March*. The ship was fitted out in *Jersey*: she sailed on her cruise on *Sunday*, the 6th of *March*, at noon; and at five o'clock the next morning she was captured by two *French* frigates and a sloop of-war, about twelve leagues from *Jersey*, and carried into *St. Maloes*.

It was in evidence, that on the 8th and 9th of *March*, there were reports in *Jersey*, which gained considerable credit, that some *French* frigates were about the coast; and that a capture had been made on the 7th; that on the latter day a ship's binnacle had been afloat at sea, on which was a compass of a particular description. The order of insurance, which was sent by the plaintiffs to the broker, bore date the 16th of *March*; up to which time, from the sailing of the ship on the 6th, these reports continued to prevail, and were uncontradicted. The plaintiffs' letter was not received by the broker till the 24th of *March*, on which day

circumstances of the case, and ought not to rest upon the opinion of mercantile men.

1. It is the duty of the assured, not only to communicate to the underwriter articles of intelligence which may affect his choice, whether he will insure at all, and at what premium he will insure; but, likewise, all rumours and reports which may tend to enhance the magnitude of the risk.

2. The opinion of underwriters, whether, upon certain facts being communicated to them, they would have insured or not the particular voyage, cannot be received as evidence. The materiality of the intelligence or rumours, which the assured is charged with having suppressed, is a question for the Jury, under the cir-

CASES AT NISI PRIUS, C. P.


816. the insurance was effected. The letter was a  
w naked order to insure the ship, and was silent  
as to all of the reports which prevailed, and as to  
all the circumstances which had occurred since  
the *Hazard* sailed.

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Another  
v.  
ERLEY.

*Best*, serjeant, for the defendant, contended that the plaintiffs were not entitled to recover: they have suppressed most important intelligence, which they ought in good faith to have communicated to the underwriters. If these rumours had been stated at *Lloyd's*, would any man have underwritten this vessel upon any terms? They have insured *mala fide*: they have thrown a risk upon the defendant, which, upon a fair disclosure of all the circumstances, he would not have undertaken. He relied upon *Lynch v. Hamilton*, 3 Taunt. 37. and the cases there cited.

*Lens*, serjeant, *contra*.—There is a distinction between rumours and actual intelligence. There is no case which goes the length of stating, that rumours are to be communicated to the underwriters. The case of *Lynch v. Hamilton* was widely different: there actual intelligence had been received and stuck up at *Lloyd's*; but mere reports, which may be founded or unfounded, which have nothing precise or defined, need not be communicated. He admitted that it was a question for the Jury, whether the rumours which prevailed between the 6th and 16th of *March* were of such a description that the plaintiffs were bound in fairness to communicate them.

*Best*, serjeant, proposed to call some underwriters to prove, that if the rumours stated had been communicated to them, they would not have engaged in the risk.

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 and Another  
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And he was permitted, notwithstanding an objection of *Lens*, and the L. C. J. expressing serious doubts as to the admissibility of the evidence, to examine to this fact.

The witnesses stated, they were of opinion that the rumours ought to have been communicated to the underwriters.

GIBBS, C. J.—The question is, did the plaintiff know any facts injurious to the adventure, which ought, in common honesty, to have been communicated to the underwriters ; I mean substantial facts, which were likely to change their opinion as to the magnitude of the risk.

Loose rumours which have gathered together, no one knows how, need not be communicated. Intelligence, properly so called, and as it is understood by mercantile men, ought to be disclosed when known. The materiality of the facts known and suppressed are for the decision of the jury. If the concealment be of a material fact, whether a rumour, report, or an article of intelligence, it ought to be communicated ; if immaterial, it may be withholden. I am of opinion, though I received it with reserve, that the evidence of the underwriters who were called to give their opinion of the materiality

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of the rumours, and of the effect they would have had upon the premium, is not admissible evidence. Lord *Mansfield* and Lord *Kenyon* discountenanced this evidence of opinion; and I think it ought not to be received. It is the province of a jury, and not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected. In the present case, the reports cannot be called loose; the plaintiff knew the frigates had been off the island; a capture was reported to have been made; a binnacle had actually been seen floating with a compass upon it: this latter circumstance was a fact; it was intelligence in its proper mercantile sense. Ought not the plaintiff to have communicated these rumours, coupled with the facts, to the broker who was to obtain the policy. He knew the current knowledge of *Jersey* on this subject; the underwriters could know nothing of it. If therefore a communication of these facts would, in the minds of reasonable men, have made an impression affecting the magnitude of the risk in which they were invited to engage, they ought to have been communicated.

The Jury were of opinion, that the rumours ought to have been communicated.

Verdict for the defendant.

*Lens*, serjeant, and *Marryatt*, for the plaintiff.

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*Best* and *Vaughan*, serjeants, for the defendant.

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and Another  
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Upon those principles of good faith which should govern all contracts of insurance, the assured is bound to communicate every species of intelligence that he has, which may affect the mind of the underwriter in either of these two ways. 1. As to the point, whether he will insure at all. 2. As to the point, at what premium he will insure. There are some old cases, upon the subject of concealment, which have never been shaken; though, as we shall shew, some reasonable qualifications have been engrafted upon them.

We shall first consider what concealments will vitiate the policy; and, secondly, what disclosures are unnecessary.

1. A merchant, having a doubtful account that a ship, *like his*, was taken, insured her without any communication to the underwriters; Lord *Maclefield*, Chancellor, held, that he ought to have disclosed what intelligence he had of the ship's danger, and which might induce him, at least, to fear that she was lost, though he had no

certain account of it; for if this had been discovered, the underwriters would not have insured at so small a premium; but would either not have insured at all, or at a higher premium; therefore, he thought that the concealment of this intelligence was a fraud. *Dacosta v. Scandrett*, 2 P. Wms. 170.

So, in *Seaman v. Fonereau*, 2 Str. 1183. Two days before the subscription of the policy, the plaintiff's agent received a letter to this effect: "The 12th of this month I was in company with the ship *Davy*, (the ship in question); at 12 o'clock in the night lost sight of her all at once; the captain spoke to me the day before that he was leaky, and the next day we had a hard gale." The ship, however, continued her voyage till the 19th, when she was taken; and there was no pretence of any knowledge of the actual loss at the time of the insurance. This letter was not communicated to the underwriter. The Chief Justice (*Lee*) held, that the letter



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ought to have been disclosed; for either the defendant would not have underwritten, or have insisted on a higher premium. So, in *Willes v. Glover*, 1 New Rep. 14., the contents of a letter, which stated the probable time of the ship's sailing, were withholden from the underwriters; and, although that expectation was not correct, as the ship did not sail till several days afterwards, yet it was deemed a material concealment.

So, in *Beckwaite v. Nalgrove*, MS. *Guildhall* (cited 3 Taunt. 41.), the plaintiff concealed from the underwriters the fact that he had received a letter from the Cape of *Good Hope*, stating that there were then two or three French privateers in those seas; and, upon the ground of that concealment, he was nonsuited. So, in *Lynch v. Hamilton supra*, it was held that the owner was bound to communicate to the underwriters any intelligence he had, which might affect his choice, whether he would insure at all, and at what premium he would insure; whether the fact was true or false. Therefore, where some ships were advertised to be in danger, and the insurer effected a policy on "ship or ship," knowing that the ship in danger was one of them, without

stating the ships' names, the Court of C. P. held, that the concealment avoided the policy, though the rumour was false. 3 Taunt. 37. See likewise *Webster v. Fosten*, 1 Esp. 407. *Fillis v. Brutton*, Park. 250. *Ratcliffe v. Schoolbred*, Marsh. 488. *Lynch v. Dunsford*, in error, 14 East 495. *Sawtell v. London*, 5 Taunt. 363. *Gladstone v. King*, 1 M. and S. 35.

The same rule applies to policies of every other description. In contracts of chance, the circumstances of every case should be fully and fairly disclosed. Therefore, where A., abroad, having two warehouses, wrote to this country to effect an insurance upon one of them *only*, without stating, as was the fact, that a house nearly adjoining it had been on fire on that evening, and that there was danger of the fire again breaking out, and sent his letter after the regular post time; and the fire, having broken out on the next day but one following, consumed A.'s warehouse; it was held to be a material concealment, though A.'s letter was written without any fraudulent intention. *Buff v. Turner and Others*, 2 Marsh. Rep. 46.

2. *As to what disclosures are not necessary.*

The assured is not bound to communicate any fact which the underwriter may be presumed to know equally with himself. In *Vallance v. Dewar*, 1 Campb. 503, Lord *Ellenborough* thus lays down the rule of disclosure—"The rule is, that the broker must communicate what is in the special knowledge of the assured, not what is in the middle between them and the underwriter. He is not bound to make a laborious disclosure of what is known to all." Therefore the underwriters are bound to know the nature and circumstances of the branch of trade to which the policy refers; and if the usage is general, it makes no difference that it is not uniform. See *Kington v. Knibbs*, 49 Geo. III. Sittings after M. T. 1 Campb. 508. *Pelly v. Royal Exchange Assurance*, 1 Burr. 341. *Tierney v. Etherington*, *ibid.* 348. *Lyons v. Bridge*, Doug. 512. *Hoskins v. Pickersgill*, Marsh. 727.

Although, at the time of effecting the insurance, the underwriter is entitled to be informed of all the circumstances relative to the actual state of the vessel, it is not necessary that he should be apprised of all the calamities which have previously befallen her in the course of the voyage. *Freeland v. Glover*, 6 Esp. 14. 7 East 457. Acc. *Schoolbred v. Nutt*, Park. 300. S. C. Marshall 475.

And the broker is only bound to communicate facts to the underwriters, and not the opinions and apprehensions occasioned by those facts. *Bell v. Bell*, 2 Campb. 475. The particular circumstances of that case, however, distinguish it from *Lynch v. Hamilton*, *supra*.

The non-communication of the damaged state of goods shipped, from which danger is likely to ensue, does not vitiate the policy, where these circumstances are unconnected with the cause of the loss. *Boyd v. Dubois*, 3 Campb. 133.

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1816.

## HASTINGS and Others v. WILSON and Others.

Assignees are not concluded by putting up the premises to sell: they may make an experiment to see if the lease be beneficial; but, in a case where they put up the premises to auction, and found a purchaser, and received a deposit; but the contract of sale afterwards went off, without the assignees shewing any reason why they did not enforce the sale: Held, that they were liable to the payment of rent, as "assignees of all the estate, and interest, &c. of the bankrupt, in the premises."

**T**HE plaintiffs sued as executors of Sir *Elijah Impey*, Knt. deceased: the defendants were assignees of *Milton*, a bankrupt.

This was an action of covenant for rent; and the question was, whether the defendants, in the character of assignees, were liable to the payment of rent. The plaintiffs charged them as assignees of the term, by derivation from the first lessee *Milton*. *Milton*, who had occupied the premises in question, became a bankrupt in *April* 1815, when the defendants were chosen assignees. They paid a quarter's rent, and on the 8th of *June* put up the premises to auction; the premises were knocked down to a purchaser for 400*l.*, who immediately paid a deposit of 99*l.* Owing to some cause which did not appear in evidence, but which was alleged by the plaintiffs' counsel to have been a misdescription of the premises, the purchaser refused to complete the contract, and the purchase money was returned. In *February*, 1816, the premises were again put up to auction, when, no purchaser offering, they were bought in by the assignees.

*Best*, serjeant, for the plaintiffs, contended, that under these circumstances the defendants were liable as assignees of the term. He admitted that assignees had a reasonable time to decide whether

they would take the lease of which they find the bankrupt possessed, or not. That the mere act of putting the premises up to auction would not make the assignees liable; but in the present case a purchaser was found and accepted, and it was their fault that the premises were not sold: at all events, after the first treaty went off, they ought to have delivered up the premises; but they make a second attempt nine months after. How long a time were assignees to claim for their election, and to keep the landlord of premises without his rent in a state of uncertainty?

1816.

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v.  
WILSON.

*Vaughan*, serjeant, *contra*, relied on *Turner v. Richardson*, 7 East 335. It was admitted in that case that assignees might make an experiment to see if the lease were beneficial: if they were concluded, by a mere offer of sale, their situation would be most perilous. There was no material distinction between the present case and the one cited. A purchaser was indeed found; but he is stated to have made an objection: that objection might be reasonable, and not imputable to any misconduct in the assignees. If the mere offering to sell had been holden not to conclude the assignees, neither ought they to be concluded in a case where, after the offer to sell, the bidder has not perfected his bidding.

GIBBS, C. J.—I am of opinion that the assignees are bound under the circumstances; I have no evidence to satisfy me why they did not enforce the contract of sale. They put up the premises to auction, find a purchaser, and receive a deposit.

1816. In the absence of evidence to the contrary, I must  
presume that contract of sale to be now in force.  
HASTINGS The contract of sale fixes them with possession,  
v. and they must shew why they did not enforce the  
WILSON. sale.

The plaintiffs had a verdict.

*Best*, serjeant, and *Parke*, for the plaintiffs.

*Vaughan*, serjeant, for the defendants.

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SITTINGS AFTER TRINITY TERM, AT  
GUILDHALL

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BELL v. SHAW.

July 10.

**T**HIS was an action of debt brought upon two bonds, given by defendant to the plaintiff; one for 800*l.* the other for 300*l.* There had been long and intricate accounts between the parties, and the plaintiff claimed a sum of money due to him for interest upon the two bonds.

The defendant pleaded *non est factum*, and a set-off; in which he admitted 1,100*l.* to be due to the plaintiff, and no more; of which sum of 1,100*l.* he undertook to discharge himself by his set-off. The plaintiff replied generally, that more than 1,100*l.* was due; to wit, the sum of 1750*l.*

Where to debt on bond, the defendant pleaded, that 1,100*l.* was due, and no more, and no undertook to discharge himself therefrom by a set-off, and the plaintiff replied, generally, that a larger sum was due, to wit, the sum of 1,750*l.* : Held, that the plaintiff was bound to prove that more than 1,150*l.* was due.

*Vaughan*, serjeant, for the defendant, contended, that it was incumbent on the plaintiff, by the issue which he had taken, to prove that more than 1,100*l.* was due from the defendant.

*Best*, serjeant, *contra*.

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veyance which appeared, on the face of it, a common transaction of bargain and sale, was dated the 15th of *April*, 1811. Notwithstanding this conveyance, *Wilson* remained in possession of the premises, and carried on the buildings; but afterwards, wanting more money, he applied to *Metcalf*, from whom the ground had originally been taken, to advance him 1,200*l*. He mentioned the conveyance to *Bromley*; and *Metcalf* agreed to pay the 880*l*. to *Bromley*, and to take an assignment from him. *Bromley*, upon a remonstrance, remitted 33*l*. from the 80*l*. for which he had stipulated, and a regular assignment was made of the premises, from *Bromley* to *Metcalf*, in *June*, 1811. *Metcalf*, who paid *Bromley* 845*l*., and made up the difference to *Wilson* between that sum and the 1,200*l*. The purchase-deed, and all the expences of the conveyance, were paid for in both instances by *Wilson*. At the time of the latter conveyance, an agreement was entered into between *Wilson* and *Metcalf*, that *Wilson* should have the liberty of re-purchasing the premises for the sum of 1,400*l*. provided the purchase was made before *September*, 1812. This agreement, which was by an independent instrument, contained an express covenant on the part of *Wilson* to re-purchase for that sum by the day mentioned, and *Metcalf* covenanted on his part to sell. *Wilson* continued in possession till he became a bankrupt, when his assignees entered upon the premises, and the present action was brought to dispossess them.

*Lens*, serjeant, and *Marryatt*, for the defendants, contended—1. That this was an usurious

bargain; that it was not what it was represented to be by the deed, a purchase of the premises, but a mere cloak for usurious interest upon a loan. The contract, which was collateral to the purchase-deed, must be taken with it, as explanatory of the whole transaction: *Wilson* expressly covenants to re-purchase the premises at an advance of 200*l.* within fifteen months. It was plain what was meant. The conveyance, notwithstanding it had the formality of a bargain and sale, was a mere colour to secure an advance of money, to be repaid with exorbitant interest. 2. If *Bromley* had no good title, by reason of usury, *Metcalf*, who derived from *Bromley*, had likewise none. The usury, indeed, had propagated itself; and deeply affected both transactions,

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*Best* and *Vaughan*, serjeants, *contra*, contended, 1. With respect to *Bromley*, there was no usury. The 880*l.* was not to be paid back at all events: the lender had put his principal in jeopardy, and was only to receive the proceeds of the sale:—*non constat*, if the premises had been sold at the end of six months, that they would have produced 880*l.*; and, if the premises sold for less money, *Wilson* was not to make up the difference. 2. With regard to the 1,200*l.* advanced by *Metcalf*, it was gone for ever: he was not to have his principal back. The contract to re-purchase was not uncommon, and could not of itself change the nature of the transaction from a bargain and sale to a loan of money.

GIBBS, C. J. The deeds on the outside have  
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the face and character of absolute conveyances; they give no intimation of a loan. The defendants contend that they are mere machinery for the advance of money; and that, although they have the form and complexion of a sale, they are in fact mortgages, and that the sole design of the parties was a loan of money; *Wilson* not intending to part with the premises; *Bromley* and *Metcalf* not contemplating a purchase. With respect to the objection to the contract between *Wilson* and *Metcalf*, that the former should re-purchase, and the latter reconvey by a given day, I am of opinion that this is not usury. *Wilson* sells for 1,200*l.*, and is to re-purchase at a large advance: this is a circumstance to raise a suspicion whether the whole transaction be not colourable; but it is not an usurious contract upon that account merely. If a sale were intended, it is a valid contract: if nothing were meant but a loan of money, it is void.—The question is, whether it be a loan, or a sale, of the premises. The agreement by *Wilson* to re-purchase at all events for 1,400*l.* looks like a loan. But it is a question for the Jury as to the real intention of the parties.

Verdict for the plaintiff.

*Best* and *Vaughan*, serjeants, and *Lawes*, for the plaintiff.

*Lens*, serjeant, and *Marryatt*, for the defendants.

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## WYATT v. GORE.

July 11.

**T**HIS was an action for a libel. The declaration stated, that the defendant was Lieut.-Governor of *Upper Canada*, and the plaintiff Surveyor General of that province. That defendant had power to suspend any officer for good cause. That the defendant, wrongfully, maliciously, and without probable cause, suspended plaintiff from his office, until the king's pleasure should be known; and that plaintiff was so suspended for two years.

The second count stated, that the defendant, without probable cause, and without legal authority, suspended the plaintiff from his office.

The third count stated, amongst other matters, that the defendant (to cause plaintiff to be deprived of his office, and induce the king to confirm the suspension,) wrote and sent to the secretary of state certain false letters, representing that plaintiff had been generally hostile to his Majesty's representatives, and was engaged with disaffected persons:

same tenor as the libel) previously current, but that the substance of the libellous matters had been published in a newspaper; and he is not required to lay a basis for this evidence, by producing such newspaper at the trial.

3. The delivery of a pamphlet by the governor of a distant province to his attorney-general, not for any public purpose, but in order that he might peruse it, is such a publication as will make him responsible in an action, if the pamphlet be a libel.

4. In an action against a governor of a colony by the surveyor-general, who held that appointment in the colony, (such office being an office at will,) for suspending him, maliciously, and without probable cause, it is necessary for the plaintiff to prove express and positive malice.

1. Communications which take place between the governor of a distant province and his attorney-general are confidential; and if a witness is interrogated as to their substance in a Court of Justice, he is not bound to answer any questions respecting them.

2. In an action on a libel, to which the general issue is pleaded, and where there is no justification, the defendant may give in evidence in mitigation of damages, not only that there were rumours and reports (of the

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that the plaintiff, moreover, had erased the name of a person from the plans in the office of surveyor-general, who was settled, and had made improvements in a favourable location of land ; and had declared the lot to be vacant ; and had obtained a grant of it for himself. That, by means of the said letters, the king confirmed the suspension, and revoked his appointment ; that plaintiff was thereby prevented from enjoying another office ; namely, the office of receiver-general of the said province. That the defendant falsely represented plaintiff to the secretary of state, as an ill-disposed person, who had been guilty of arbitrary and improper conduct.

The fourth count stated, that the defendant falsely composed a certain false libel, in the form of a letter, or address, to Lord Castlereagh, without any signature, imputing to the plaintiff criminality, and arbitrary and gross misconduct in his said office.

The fifth count stated ; that the defendant composed a certain false libel, imputing to the plaintiff treasonable and seditious conduct.

The defendant pleaded first, not guilty. Secondly, as to the letters written to the secretary of state, representing that the plaintiff, whilst surveyor-general, had erased the name of a person from the plan in the office, and had reported the lot to be vacant, and had obtained a deed or grant of it for himself,—he pleaded that the plaintiff, whilst surveyor-general, did erase the name of a person from the plan

in the office ; wherefore the defendant sent such letters for the king's information as it was lawful for him to do, and for the causes aforesaid.

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Replication to the second plea, *de injuriâ suâ propriâ*.

The circumstances were these :—The plaintiff was appointed surveyor-general of *Upper Canada*, in 1807, at which time the defendant was lieutenant-governor of that province: the office of surveyor-general was holden at the will of the crown ; and the defendant, without assigning any cause, suspended the plaintiff from his employment. Mr. *Wyatt* left the island, to make application to government ; but the suspension was not taken off ; and he was finally removed from the office. General *Gore* continued in *Canada*, and the present action was brought ; 1. For suspending Mr. *Wyatt*, maliciously, and without probable cause. 2. For false representations to the government, injurious to Mr. *Wyatt*, and which prevented his restoration. 3. For a libel, charging Mr. *Wyatt* with disaffection to the government, and general misconduct in his office of surveyor-general in *Upper Canada*.

In the course of the cause, the attorney-general of the province was called as a witness, and asked as to the nature of some communications made to him by the defendant relative to Mr. *Wyatt's* conduct.

*Lens*, serjeant, for the defendant, objected to

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this evidence. It would be highly indecent for a public officer to disclose what passed between him and the governor upon this occasion: it was a confidential communication.

*Best, contra.*—If the communications were in the course of office, and related to the internal affairs of the province, the witness would be privileged: but a governor has no greater right to libel an individual before his attorney-general than before another man. He sends for his attorney-general, not to consult him, but to defame Mr. Wyatt.

GIBBS, C. J.—The witness is not bound to answer; and, in delicacy, he will not answer such questions. Whether the conversations, in which reference was made to Mr. Wyatt's conduct as surveyor-general, were on public or private business, they ought not to be disclosed. The governor consults with a high legal officer on the state of his colony; what passes between them is confidential: no office of this kind could be executed with safety, if conversations between the governor of a distant province and his attorney-general, who is the only person upon whom such governor can lean for advice, were suffered to be disclosed.

The witness then produced a pamphlet, which the defendant delivered to him in the year 1809. In this pamphlet the libel in question was contained: it had not been generally circulated; but copies were in the hands of the principal civil officers of the province. The witness was asked whether the

substance of what was stated in the pamphlet had not previously appeared in a newspaper, published in *Upper Canada*.

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*Best*, serjeant.—This evidence is not admissible without producing the newspaper. Admitting the authority of some late cases, (which are acknowledged to have broken in upon the old law,) reports, circulated by numbers, may be given in evidence in this general manner. But *written* reports, or publications, must be produced: this was the first rule of evidence. A witness is asked the contents of a paper; when, for any thing which appears to the contrary, the paper itself may be produced: and, if produced, the Jury are the only judges whether it contains the substance of the pamphlet.

*Lens*, serjeant, *contrà*.—The defendant, in a case where he does not justify the libel, is permitted to mitigate the damages upon the general issue by evidence like the present. The rule in the *Earl of Leicester v. Walter* is agreeable to good sense; and, whenever damages are sought in a like action, it is sound law. He cited likewise the case of *Webster v. Baldwin*, which was an action for a libel, tried in *Hilary Term* 1816, in this Court; in which similar questions were put in mitigation of damages. Besides, where was the distinction between oral and written reports? What was a newspaper but a diurnal report?

GRASS, C. J.—I think the question may be put. The circumstances of this case are peculiar; and

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I am of opinion that the defendant's counsel *may* ask the witness, whether, previous to the delivery of this pamphlet, he did not read, in a public newspaper, the substance of the libel charged in the declaration ?

The pamphlet was produced : it charged Mr. *Wyatt* with gross misconduct, and an abuse of his powers as surveyor-general of the province.

*Best*, serjeant, abandoned the counts which charged the defendant with sending false representations to government ; and admitted, that it was incumbent upon him to shew that there were no just and sufficient grounds for Mr. *Wyatt's* suspension ; that the defendant acted maliciously, and without probable cause, in suspending him. It is true the appointment of surveyor-general was an office at will ; and the governor had authority to suspend the plaintiff ; but he must exercise his authority without malice. Now malice, and the want of probable cause, were to be inferred from the publication of the pamphlet by governor *Gore* : this was a libel upon Mr. *Wyatt* ; and it was evidence that the governor had acted from malicious motives.

*Lens*, serjeant, *contra*—1. There is no proof of express malice. 2. Can the alleged libel, under the circumstances of the case, be said to have been published ?

GIBBS, C. J.—I am of opinion that the plaintiff has not proved the want of probable cause : he has given no evidence of acts or declarations that

the defendant would, right or wrong, dismiss Mr. *Wyatt* from his office: now, without something which fixes positive and direct malice, the first counts of this declaration fail. Mr. *Wyatt's* office was an office at will; the governor abroad could only suspend: the government at home have removed Mr. *Wyatt*; they have done more than confirm the suspension. This, up to a certain extent, negatives the want of probable cause: but, it is said that the subsequent publication of the pamphlet is evidence that the previous suspension of Mr. *Wyatt* was malicious and unjust. Now, the pamphlet was not published till two years after the suspension, and has no specific reference to the grounds of that suspension: the charges, therefore, contained in it, were not necessarily the reasons which induced the defendant to dismiss Mr. *Wyatt*. On the second point, I think the delivery of the pamphlet to the attorney-general, not being for any official purpose, instruction, or advice, was a publication; and I think the matters it contains are libellous.

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Verdict for plaintiff; 300*l.* on the count for a libel.

*Best* and *Pell*, serjeants, and *Richardson*, for the plaintiff.

*Lens*, serjeant, *Harrison*, *Copley*, serjeant, and *Coltman*, for defendant.

With regard to actions brought by inferior against superior officers, see *Johnstone v. Sutton*, 1 T. R. 548.

The points suggested by the case in the report are these:—

1. What communications are privileged? 2. What evidence,



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short of justification, may be admitted upon the plea of not guilty, in mitigation of damages. 3. What are the general qualities of the justification of a libel? 4. What shall amount to the publication of a libel?

*I.—What communications are privileged.*

With regard to the first point, it lies in a word:—The law respects communications made in confidence, notwithstanding they may be false and erroneous, and prove injurious to the party. This rule, or rather limitation with respect to the general law of libel, applies equally to words written and spoken. It is meant to protect the communications of business, and the necessary confidence of man in man. But, if the communication be malicious, as well as false, and, under the cloak of confidence, be meant to defame, it is no longer within the protection of the rule. The law not only extends this exemption to the confidential communications of friendship, but to all such charges as necessarily exclude the suspicion of malice. *Weatherston v. Hawkins*, 1 T. R. 110. *Dunman v. Bigg*, 1 Campb. 269. *Rex v. Hurt*, 2 Burn's Eccl. Law, 779.

Under communications of

friendship, are of course included these of man to man, in the aid of business, duty, public or private functions, security of property, or of the morals and manners of his family; in a word, every communication, the object of which is to assist one man without injuring another; and to discharge the offices of a man, a citizen, and a Christian. The law of libel, in this respect, only repeats and confirms the law of moral duty; and, in any doubts on this head, it may always lead us to a safe conclusion in law, to enquire simply, what was our duty as to the point in dispute in morality.

*II.—What evidence, short of justification, may be admitted upon the plea of not guilty, in mitigation of damages.*

With respect to the evidence which may be admitted under the plea of not guilty, a few remarks may be necessary.

The plea of not guilty requires the plaintiff, on his part to prove all the material allegations; that is to say, the publication, and all such prefatory inducements, as are the adjuncts and qualities of the offence, as stated in the declaration. But it does not require him, nor need he prove, the falsity

of the words or writing. The general issue does not raise the question of their truth; it rests upon the defendant, in an action, to prove their truth, having first fairly apprised the plaintiff of his intention, by a plea. Under the plea of the general issue, the defendant may prove, that he was an innocent publisher; or may give in evidence that the supposed libel is a judicial proceeding, or the copy of a report of the House of Commons; that it is a fair narrative of a trial at law; that it has been innocently published, as by reading out of a book; that it was a mere matter of caution to a friend, and without malice in the defendant; that it was admonition, or confidential communication; that it was the subject of amicable or Christian reproof; that it was the fair use of the defendant's own judgment in the criticism of works of art or literature; that it was the investigation of science: in a word, all such matters of defence may be given in evidence under the general issue, as in reason, and therefore in law, are sufficient vindications. Many of these defences may be specially pleaded; and if the defence be, that the publication was a true re-

port of a trial at law, it ought perhaps to be pleaded specially, *Curry v. Walter*, 1 Bos. and Pul. 523. The defendant may also, on the general issue, prove, in mitigation of damages, such facts and circumstances as shew a ground of suspicion, not amounting to actual proof, of the guilt of the plaintiff. *Earl of Leicester v. Walter*, 2 Campb. 251. Something short of the truth, and to shew a probable occasion of speaking or writing the defamatory words, may be given in evidence under the general issue. "So far," says Lord Ellenborough, "I assent to the case of the *Earl of Leicester v. Walter*, and no farther." *King v. Perrott*, H. T. 1814.

In *Williams v. Callender*, 50 Geo. III. T. T. K. B. MS. it was holden by the same Judge, that "though there was no justification on the record, the defendant might give in evidence somewhat of the real character of the plaintiff, and shew that it was not unblemished and entire. But if he contend that the libel is substantially true, then he must plead a special justification, the proof of which lies upon him." *Holt's Law of Libel*, 270.

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III.—*What are the general qualities of the justification of a libel.*

The ground of the action on the case for a libel, is the *quantum* of injurious damage which the person libelled either has, or may be presumed to have sustained, from the libellous matter. It is evident, therefore, that if the subject of the libel, both in its substance and measure, be truly imputed to the plaintiff, that there can be no such injurious damage. The reputation cannot be said to be injured where it was before destroyed. The plaintiff has previously extinguished his own character. He has, therefore, no basis for an action to recover compensation for the loss of character, and its consequential damage. The law considers him as bringing an action of damage to a thing which does not exist. Least of all will it allow such a person *lucrari ex malâ fumbâ*. The law, moreover, has herein a kind of moderate and prudent regard to the interests of society, which are in some degree upheld by the awe and apprehension which bad men entertain of public reproach. Under all these views, therefore, the law in an action for libel permits the defending party to

justify by alleging that what he has said is true.

The authorities for the position that the defendant may plead the truth of a libel in justification, are the *dicta* of Hobart, C. J. in *Lake v. Hatton*, Hob. Rep. 253. and of Holt, C. J. in an anonymous case, 11 Mod. 99.: but the position is warranted by the general principles of law, as applying to the remedies for civil damage, and the uniform practice at the present day. *J'Anson v. Stuart*, 1 T. Rep. 750. All the Judges gave their opinion to this effect in Parliament, upon questions put to them on the Libel Bill, 1792.

A justification of a libel, however, in the cases in which it is admitted, must not be pleaded in loose and general terms; but it must affirm the truth of the very point and substance of the imputed slander. The law does not allow pleas of justification, contained in general charges of fraud and felony committed by the plaintiff, because they do not apprise the plaintiff of the defence which is intended to be set up. *Newman v. Bailey*, cited 1 T. R. 750. *J'Anson v. Stuart*.

The justification of a libel must state issuable facts, and the particular acts and offences

with which the defendant charges the plaintiff. *Holmes v. Catesby*, 1 W. P. T. 5. 543.

In an indictment, however, or an information for a libel, the ground of the legal proceeding is totally different. The basis here is the actual or possible injury to the public peace. Now, it evidently makes no difference in the mischief of a libel, in this point of view, whether the subject be true or false. A bad man is as likely, and indeed more so, to revenge himself than a good man. The truth or falsehood is totally immaterial in the mischief. The law, therefore, as a justification, puts them out of the question. The act itself is a positive crime; and, therefore, like theft, perjury, &c. admits but one simple plea, that of not guilty.

This doctrine is so firmly settled, and so essentially necessary to the maintenance of the King's peace, and the good order of society, that no Court of Justice has at any time allowed it to be drawn into debate, 5 Coke, 12.; Hob. 253.; Hawk, P. C. c. 73. s. 6. It is well observed by Lord Coke, and is indeed derived from the admirable example of the Roman law, that, in a settled state of government, the party aggrieved ought to complain for

every injury done to him in the ordinary course of law, and not to revenge himself by the odious means of libelling, or otherwise.

In indictments, the word *false* is part of the formal description of the crime. It is, however, merely formal, and not material. It is in fact one of those popular adjuncts, which, in the simpler times of the law, crept from common discourse into the language of pleading. It has therefore been retained; but, like "the instigation of the devil," in an indictment for murder, it is merely surplusage. It is the duty, and has always been the practice, of courts of justice, to separate the substance of crimes from their formalities, and to require proof only of what is material.

The epithet *false* is not applied to the propositions contained in the libel, but to the aggregate criminal result, the libel. *Falsus libellus* is used in the description of a libel, as *falsus proditor* in high treason; that is to say, wickedly, without true cause or justification. In point of substance, the alteration in the description would hardly be noticeable in law, if the epithet were *verus* instead of *falsus*.

The law, however, with that

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prudence with which it qualifies all its enactments for the public good, has administered an indirect check over any possible mischief which a bad character might effect under this shelter. Upon an application for a criminal information, the party libelled must deny upon oath, if the charge be capable of a distinct negative, the truth of the matter alleged. The Court will not assist him without this self-purgation. He must come forward with clean hands. They will not indeed, as a matter of course, permit the defendant, in his answer to a conditional rule, to justify the truth; but they produce the same effect, by compelling the prosecutor, when it is possible, to swear to the falsehood.

And in respect to indictments for libel, from the very manner in which an indictment is preferred, *ante corpus comitatus*, by which country, it must be presumed, the character of the party is sufficiently known, a similar check is administered: add to this, the uniform practice of the Grand Jury to examine the prosecutor, upon oath, to the matters of the libel, which answers the same purpose as an exculpatory affidavit upon a motion for a criminal information. Thus, we see the law

of *England* stands clear of any immoral countenance of vice, or mischievous diminution of that salutary check upon bad men, public opinion and report.

IV.—*What shall amount to the publication of a Libel.*

In order to maintain a civil or criminal proceeding for a libel, it is necessary to shew that it was published. Until the publication the act is not complete in its mischief; before it is dispersed abroad it can produce no present or actual injury either to the public or the individual; and, until then, there is a *locus penitentiae* on the part of those concerned in the composing or writing.

Therefore, if a man deliver by mistake a paper out of his study, it is not a publication, though it be a libel. 5 Mod. 167.

The reading of a libel in the presence of another without knowing it to be a libel, with or without malice, does not amount to a publication. 4 Bac. Abr. 458. Also it is holden, that he who repeats part of a libel in merriment, without any purpose of defamation, is not punishable. But *Hawkins* says, the reasonableness of this opinion may justly be questioned, for that jests

of this kind are not to be endured, and the injury to the party grieved is no way lessened by the merriment of him who makes light of it. Hawkins, P. C. c. 73. § 14. But it seems to be settled, that if he who has either read a libel himself, or who has heard it read by another, should afterwards maliciously read or repeat any part of it in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication. Hawk. P. C. c. 73. § 10.

But having a copy of a libel is no publication. Vin. Abr. 12. 224. It is said by Lord Coke, in the case *de libellis famosiss*, to have been resolved; that if one finds a libel, and would keep himself out of danger, if it be composed against a private man, the finder may either burn it, or deliver it to a magistrate; but if it concerns a magistrate, or other public person, the finder *ought* presently to deliver it to a magistrate, to the intent that by examination and industry the author may be found out and punished. But it has been justly observed, that the not delivering it to a magistrate was only punishable in the Star Chamber at the height of its despotism, and that the barely having a libel

in one's custody was no offence. 1 Vent. 3.; *contra sensu*, 2 Salk. 418; Lord Raym. 417. 3 Campb. 323.

Upon the trial the libel must be produced; and before it is read, it must be proved that it was published by the defendant, or by others, with his privity.

It is not competent to a defendant charged with having published a libel, to prove that a paper similar to that for the publication of which he is prosecuted, was published on former occasions, by other persons, who have never been prosecuted for it. *Rea v. Holt*, 5 T. R. 436.

Proof that the libel was contained in a letter directed to the plaintiff, and delivered into the plaintiff's hands, is not sufficient proof of a publication to maintain an action; but an indictment or information will lie.

No matter which is stated in any memorial or petition against the conduct of magistrates or public officers, shall be deemed a libellous publication, if it be done *bonâ fide* with a view of obtaining redress; and likewise if it be addressed in the proper channel by which such redress may be had; that is, to the persons who may be presumed to have power to give such redress.

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As where the defendant, being Deputy Governor of Greenwich Hospital, compiled and wrote a large volume, of which he printed several copies, containing an account of the abuses of the hospital, and treating the characters of many of the officers of the hospital, (who were public officers) and Lord *Sandwich* in particular, who was then First Lord of the Admiralty, with much asperity. He distributed the copies to the *governors of the hospital only*; but it did not appear that he had given a copy to any other person. On a rule for an information for this libel, Lord

*Mansfield* observed,—that this distribution of the copies to the persons only who were from their situations called on to redress grievances, and had from their offices competent power to do it, was not a *publication* sufficient to warrant a criminal information; and he seemed to think, that whether the paper were in manuscript or printed, under these circumstances, made no difference. *Rex v. Baillie*, M. T. 30 Geo. III. B. R. *Oliver v. L. W. C. Bentinck*, 3 Taunt. 456. and *Jekyll v. Sir John Moore*, 2 New Rep. 341. Holt's Law of Libel, 172.

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SITTINGS AFTER TRINITY TERM, 56 GEO. III.  
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## BEECHING and Others v. GOWER.

**T**HIS was an action for money had and received. The plaintiffs are bankers at *Tunbridge*. On the 5th of *March*, 1816, the defendant brought some notes to their bank, which he desired to exchange for *Tunbridge* notes; they accordingly gave him their own notes, and, amongst other notes, they received from him a 10*l.* note of the *Kentish* Bank, payable at the banking house at *Maidstone*, and at *Ramsbottom's* and Co. in *London*. The plaintiffs sent the 10*l.* note to *London* on the evening of the 5th; on the 6th it was presented for payment at *Ramsbottom's*, whose house stopt on that day, and the note was dishonoured. It was returned to the plaintiffs on the 7th, and notice was then given to the defendant; but he refused to pay it. *Ramsbottom's* house paid the whole of the 5th of *March*, and shut up on the 6th. The *Maidstone* Bank, which had issued this note, paid the whole of the 6th, but shut up on the 7th. *Maidstone* is only fourteen miles from *Tunbridge*; and the plaintiffs had an agent there.

A banker's promissory note is made payable at *Tunbridge*, and likewise at *London*. The holder has a right to present it at either place, and if payment be refused in *London*, it is no defence on the part of those who contend that the holder has been guilty of laches, to prove, that if payment had been demanded at *Tunbridge*, which was the more convenient, and nearer place, the bill would have been paid.



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cannot recover; they have been guilty of laches. I will not say that it was not their duty to have sent the check off by the post of the 5th; but the extreme time up to which they were justified in keeping it, was till the post of the 6th. They do not send it till the

7th. It does not matter when the carrier arrived; they must suffer for their negligence.

Plaintiffs nonsuited.

*Blossett*, serjeant, and *Taddy*, for the plaintiff.

*Best*, serjeant, and *Gaslee*, for the defendant.

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GOUGER v. JOLLY.

July 15.

**T**HIS was an action against a common carrier, brought to recover the value of a parcel of silk, which had been lost in the conveyance from *Evesham*, in *Worcestershire*, to *London*.

Though a carrier may, by law, limit his responsibility, a notice of certain limitations on his general liability, suspended at the termini of his journey, will not attach upon the delivery of goods at intermediate places, where no such notice is given.

The plaintiff had employed a person of the name of *Shenstone*, at *Evesham*, as a throwster: it was his duty, by contract, when the silk was fit to be used, to send it up to *London*; and he was to pay the carriage. The defendant was the proprietor of a waggon travelling between *Worcester* and *London*, and passing through *Evesham*. At *Worcester* a notice was publicly suspended in the office, by which the defendant professed that he would not be responsible "for cash, jewels, lace, silk, &c. however small the value, unless the goods were specified, and entered as such; a special agreement made for the carriage of the same, and a premium paid accordingly." In the *London* office a notice was suspended, in its general effect similar, but differing in many particulars from the one at *Worcester*. There was no notice put up at the receiving house at *Evesham*; and the silk was taken in, and the carriage paid, in the ordinary manner.

*Onslow*, serjeant, and *Richardson*, for the defendant, made an objection, that the defendant, as carriers were by law permitted to do, had limited

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his responsibility: he says he will not be answerable for "silks," unless specified, entered, and received upon a special agreement. He gives this notice publicly in his offices at *Worcester* and *London*. This was not an *Evesham* waggon, but a *Worcester* waggon. It is sufficient if the notice be made public at the *termini* of the journey. No case had determined that a notice was necessary at every public-house on the road where goods were received.

*Shepherd, S. G. contra.*

*GIBBS, C. J.* The carrier is responsible, unless express notice be brought home to the plaintiff. But a notice of certain limitation upon his general responsibility, suspended at his offices in *London* and *Worcester*, will not attach upon the delivery of goods at an intermediate place, where no notice is stuck up. Goods delivered at such places come under his general responsibility; and he is answerable for their loss. It has been holden by Lord *Kenyon*, that notices at the *termini* of a journey were not sufficient to protect carriers with respect to goods taken in at intermediate receiving houses. His Lordship added, that carriers should be cautious that their notices corresponded in all places where they were affixed, or their liability would be affected by a variance.

*Shepherd, S. G. and Comyn, for the plaintiff.*

*Onslow, serjeant, and Richardson, for the defendant.*

A variety of cases has established, that notices of the kind stated in the text are binding upon the public. The cases are indeed almost too familiar to be cited, *Clay v. Willan*, 1 H. Black. 298. *Izett v. Mountain*, 4 E. R. 370. *Nicholson v. Wil- lan*, 5 E. R. 507. Indeed, in a very old case, *Kenrick v. Eggleston*, Aleyn 93, it was decided that the liability of a carrier might be restrained.

The exemption of carriers, by reason of notices of this sort, has been carried to its utmost extent; and the present disposition of our courts of justice is to curtail it. It cannot indeed be supported upon any other ground than that a carrier, who obtains a small reward only for the carriage of goods, should not be held liable to a large amount.

Carriers, therefore, are exempted from liability where the goods are of a much larger value, than, from a knowledge of their bulk and quality, they could possibly guess them to be: but this exemption does not apply to goods of a large bulk and known quality, where the value must be obvious. Therefore, in a recent case, *Beck v. Evans*, 16 East 214. it was determined, that a public notice given by carriers, that they would not be

answerable for certain specified articles, or any other goods of what nature and kind soever, above the value of 5*l.* if lost, stolen or damaged, (unless a special agreement was made, and a premium paid at the time of delivery,) was held not to extend to goods which did not fall within any of the specified articles; and which, from their bulk and quality, communicated to the carriers at the time of their delivery, must have been known to exceed the value of 5*l.*

Such notices, therefore, though in their terms made to extend to any goods of what nature and kind soever, (which is now the general tenor of such notices suspended in the office of carriers,) cannot be indefinite, but must be construed with reference to the subject matter, and to cases where the carrier has no means of knowing what is the nature of the goods committed to his care, *Down v. Fromont*, 4 Campb. 40.

2. A carrier cannot stipulate for exemption from the consequences of his own misconduct; and is, at all events, liable for damage arising from gross negligence. If goods, therefore, are entrusted to him, and he is guilty of any misfeasance, or gross neglect,

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his notice will not protect him, *Beck v. Evans, ante*. A loss arising from the *personal* default of the carrier, is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c. *Lyon v. Wells*, 5 East 428.

3. Although there is nothing unreasonable in a carrier requiring a greater sum when he carries goods of a greater value, he is not permitted, by law, to charge what he pleases. A carrier is liable to carry

every thing that is brought to him, for a reasonable sum to be paid for the same carriage; and cannot extort what he pleases, per *Lawrence*, J. in *Harris v. Packwood*, 3 Taunt. 272.

See likewise, as to the responsibility of carriers, and the manner of declaring in actions brought against them, *Clarke v. Gray*, 6 East 564. *Clayton v. Hunt*, 3 Campb. 27. *Cobden v. Bolton*, 2 Campb. 108. *Buttler v. Heane*, 2 Campb. 415.

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## STEWART v. SMITH.

**T**HIS action was brought to recover 28*l.* the moiety of the expense of erecting a party wall between the plaintiff's house and a house occupied by the defendant. Upon the evidence, it appeared that the old party wall being out of repair, it became necessary to rebuild it; that the plaintiff applied to the defendant, who enquired what the expense would be; and, upon being told his proportion, said, "Very well, I shall expect to pay what is right and fair." About six weeks after the wall was rebuilt, the plaintiff called on defendant for 10*l.* in part payment; the defendant said it was not convenient for him to pay. It appeared that the defendant paid rent to two persons, (*viz.*) 32*l.* to one, and 18*l.* to another: the wall was rebuilt in *September* 1815. Since the action was brought, the defendant has offered his lease for sale for 300*l.* It was admitted that no notice of accounts, as directed by the act, (14 Geo. III. c. 78. § 41.) had been delivered to the defendant, or left at his house.

Parties may come to an agreement to dispense with the formalities of the Building Act. If the occupier of premises, the owner of the improved rent of which is liable to the rebuilding of a party wall, voluntarily assumes the responsibility, by a promise, (not in writing) there is a sufficient consideration to support an action on such promise, resulting from his occupation of the adjoining premises; and this is evidence to be left to the Jury that he is owner of the improved rent. Especially in a case where there is evidence of his having subsequently offered his lease to sale for a sum of money in gross.

*Vaughan*, serjeant, for the defendant, made two points:—1. The 41st section of the Building Act throws the burthen of rebuilding and repairing party walls upon the *owners of the improved rent*. There was no evidence that defendant was such owner. The fact of his having offered his lease for sale long after the

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wall was rebuilt, did not prove his original liability. Had he even sold his lease for a premium, it would not make him liable as owner of an improved rent; for it is in evidence that he pays rent to two distinct persons, one or other of which rents, in the absence of evidence, may be presumed to be an improved rent.—2. His promise to pay must be construed with reference to his legal liability. If the obligation to repair be in another person, such promise, not being in writing, was void by the statute of frauds. But the effect of the words is not a general promise; nor does it dispense with the provisions of the Building Act. “I shall pay what is right and fair.” This is no dispensation of the means prescribed by the statute for ascertaining what is “right and fair.”

GIBBS, C. J.—The act requires certain forms which must be complied with against an adverse occupier. But neither the Act of Parliament, nor the forms, are very clear and precise. I agree that the owner of the improved rent is alone liable. But there are two questions in this case:—1. Have not the parties come to an understanding to dispense with the formalities of the Building Act; which they may do? 2. Has not the defendant made himself liable by his promise? He desired to know what the expense would be, and agreed to pay his moiety. He assumes the responsibility upon himself; and, as occupier, there is sufficient consideration for him to make such agreement; supposing him not to be the owner of the improved rent, though there is a strong presumption that he is such owner. The construction of the

evidence will be for the Jury ; but I think the plaintiff entitled to recover.

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Verdict for the plaintiff.

*Best serjeant, and Onslow, for the plaintiff.*

*Vaughan, serjeant, and Ross, for the defendant.*

In the next term, a motion was made for a new trial, but the Court unanimously concurred in opinion with the L. C. J. It is to be lamented that the 14th Geo. III. c. 78., an act of parliament, of the last importance in cities and towns, should in some of its provisions be so difficult of application; and, in all, so hard to be understood. Cases are constantly occurring upon the construction of the clauses, particularly at *Nisi Prius*. The result of what has hitherto been determined seems to be this.

The act provides, that every owner of a house who shall think it necessary to pull down and rebuild any party wall, in case the owner of the adjoining house will not agree touching the same, shall give three months' notice in writing to the owner if known, or, otherwise, to the occupier of such adjoining house, of his

intention, by delivering a copy of such notice, &c. In this notice he is to name his surveyors; the time of attendance; and to require the other owner to appoint two other surveyors to meet them, at the appointed time and place, to certify the state of the party wall, &c. The act then makes provisions in case of the default of one party, by directing the attending surveyors to certify the state of the premises to the justices at the quarter sessions, &c.; the certificate to be filed; an appeal to be permitted within a reasonable time, &c.; if no appeal, or if the certificate be confirmed on appeal, the party who has followed the provisions in the act, may pull down, rebuild, &c. The 41st section then directs how the expenses of the party rebuilding are to be reimbursed by the owner of the adjoining house; to what amount, and



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in what proportions, *vide section*. It then directs, that, within ten days, &c. after such party wall shall be built, such first builder shall leave at such adjoining house a true account in writing of so much thereof for which the owner of such adjoining house shall be liable to pay, and also an account of other expenses and costs; "whereupon it shall be lawful for the tenant or occupier of such adjoining building to pay such proportional part, costs, expenses, &c.; and to deduct the same out of his rent, &c." If the expenses be not paid within twenty-one days after demand, a remedy is given against the owner, by action of debt, or on the case. Now the result of the cases upon the construction of the above clauses seems to be this.

1. That the manifest intention of the legislature was, to throw this burden on the lessees of building leases, by whom the value of the estates is considerably improved, and who afterwards make underleases, reserving improved rents. Nor does it make any difference whether such person continue lessee of the term, or sell his lease *for a sum in gross*; in which latter case, he seems equally to be within this act. But, where a lessee

for twenty-one years, at a peppercorn rent for the first half year, and a rack rent for the rest of the term, who, by agreement, was to put the premises in repair, and who covenanted to pay all taxes, &c. having assigned his term for a small sum in gross, was held not to be liable to pay the expenses of a party wall, either by the provisions of the statute, or by his covenant; but that the charge must, in such case, be borne by the original landlord. *Southall v. Leadbetter*, 3 T. R. 458. So, notwithstanding the lessee has improved the house demised, the lessor of the premises, at rack-rent, (there being no other person entitled to any kind of rent,) is liable to contribute, and not the tenant. *Beardmore v. Fox*, 8 T. R. 214. *Secus*, if such lessee, at rack rent, underlet the house at an *advanced* rent. He is then to be considered as the owner of the *improved* rent, which, in the terms of this act of parliament, stands contradistinguished from *some other* rent. *Sangster v. Birkhead*, 1 B. and P. 303. Nor would the operation of the statute be varied by any covenants for repair entered into between such landlord and his tenant. *Ibid*. It is the owner of the im-

proved rent, and not of the *ground* rent, who is made liable by this act. *Peck v. Wood*, 5 T. Rep. 303. But where the tenant covenanted to pay a reasonable share and proportion for repairing party walls, &c., and it became a necessary inference from the covenants, that the landlord should receive a certain net yearly rent, clear of all deductions, &c. during the lease, it was held, under the conditions of such contract, that the tenant, and not the landlord, should pay the expenses of a party wall. But it was upon this principle, as observed by Kenyon, L. C. J., in the case, that "*modus et conventio vincunt legem*." *Barrett v. Duke of Bedford*, 8 T. R. 602. But, though the operation of the statute is not varied by a *general* covenant to repair on the part of the tenant; and the landlord, (or whoever be the owner of the improved rent,) is the party bound to contribute, he is, nevertheless, liable only to reimburse his tenant money paid by him to the other owner, for such works as are authorized to be done by such owner, in respect of such adjoining house. *Robinson v. Lewis*, 10 East 227. The act of parliament gives the tenant liberty to deduct

payments, made, by virtue of this act, out of his rent: but questions may arise whether his immediate landlord be the person liable; he may be lessor, without being owner of the improved rent. In *Sangster v. Birkhead*, *supra*, Eyre, C. J. looking to this point, says, "I think it was intended by the legislature that the tenant should pay a moiety of the expense to the person building the wall, and reimburse himself by deducting the amount out of the rent of his immediate landlord; leaving it to *him* to make his claim on such other persons as he may think liable. This appears to me the best construction for putting the business in a practicable shape. It is easy to see that this is an ill penned law, and its meaning is left uncertain."

He is considered to have the improved rent who receives more than the person of whom he takes the premises: and, if there be only one year of the term to come, if it have been originally demised on an *improved* rent, the lessor of such term would be liable. It seems strange, however, that the legislature should think that there must be an improved rent in respect of every house.

2. With respect to the other

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clauses of the act which bear on the present point, a few words will suffice. The three months' notice, required by section 38, is only necessary where the person (who at the time when it is required to build, &c. is liable to pay,) cannot agree with the owner of the adjoining house. *Peck v. Wood*, 5 T. R. 130. But before an action can be brought to recover a proportion of the expenses of building a party wall, the accounts prescribed by sect. 41, must be delivered, whether the house be occupied by the owner or the tenant; and a formal demand of the money must be made twenty-one days before the action is brought. *Philp v. Donati*, 2 Taunt. 62.

3. With respect to the property in party walls, with regard to which some questions have arisen, the rule is this:—If two persons have a party wall, one half of the thickness of

which stands on the lands of each, they are not, therefore, tenants in common of the wall, nor of the land on which it stands, although the wall was erected at the joint expense of the two proprietors. For, the statute, though it gives each party certain rights in a wall built in this way, does not make it a common property; it only confers on each a right to use it for certain purposes. Each party, for an injury done to that part of the wall which stands on his own land, must, of consequence, have the ordinary remedy: but the parties are severally owners of their respective lands, as before: each is entitled to an easement on the wall in the land of the other: but there is no transfer of property; and the property of the wall ensues the property of the land on which it stands. See *Matts v. Hopkins*, 5 Taunt. 20. and *Moore v. Clarke*, 5 Taunt. 20.

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## GURR v. RUTTON.

**T**ROVER, by the assignee of one *Chapman*, a bankrupt, to recover the possession of certain property alleged to have belonged to *Chapman*, before his bankruptcy. The question turned upon a reputed ownership: the defendant rented a large farm in the island of *Shepey*, on which he depastured several thousand sheep; but, being obliged to quit his farm, and remove his stock, he hired of *Chapman*, who carried on the business of a farmer and butcher, near *Faversham*, a tract of land of 170 acres, in *Ham* marshes. The bankrupt, at this time, was tenant to a person of the name of *Bloxland*. The defendant agreed to give *Chapman* an advance on his original rent, and to take all his crops and stock; which he bought and paid for at a valuation: an agreement was then made between them that *Chapman* should continue on the farm, and act as the defendant's manager and bailiff; that he should buy and sell stock for him, and superintend the farm as he had been heretofore accustomed. On the part of the plaintiff, evidence was given that the reputation amongst the servants and neighbours was, that *Chapman* was the owner; that no visible change had taken place in his circumstances; and that they continued to act towards him as formerly. On the part of the defendant, it was proposed to give a body of evidence contradicting this reputation; and to shew that *Rutton* paid the

In an action by the assignee of a bankrupt, claiming property which the bankrupt is alleged to have had in his possession, order, and disposition, as the reputed owner at the time of his bankruptcy, it is competent for the defendant, who has paid a valid consideration for the property, to give evidence of a contrary reputation, and to resist the claim of the plaintiff under the statute 21 Jac. I. c. 19. s. 11. upon those grounds.

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taxes of the farm ; that his name had been substituted for *Chapman's* in the collector's books ; and that he was considered by a number of tradesmen who supplied the farm, as the sole owner and proprietor of the stock, &c.

*Shepherd*, S. G. objected to this evidence : the question was, had not the defendant left the bankrupt in possession of property which tended to delude the world, and to induce an opinion that he continued owner as before. The fact of his being in possession was proved ; and a reputation, contrary to the fact, could not be admitted.

GIBBS, C. J.—I think this is a case in which I am bound to receive the evidence offered. There is no question that a good consideration was paid by the defendant : but he is charged with having left the property in the possession, order, and disposition of *Chapman*, by means of which he gains the reputation of continuing the owner as he had heretofore been. Now what is reputation of ownership ? It is made up of the opinions of a man's neighbours ; it is a number of voices, as it were, concurring upon one or other of two facts. Are we to count the voices upon one side, and to pay no attention to the numbers on the other ? If we admit reputation, that is to say, the opinion of a certain number of neighbours to impeach the defendant's claim, are we not to admit the opinions which favour it ? The Jury must look to the facts upon which the opinions on both sides are formed ; but I think the evidence admissible.

The defendant afterwards had a verdict upon the merits.

*Shepherd, S. G. and Bayly, for plaintiff.*

*Lens and Vaughan, serjeants, and Holt, for defendant.*

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The following is the section of the 21st Jac. I. c. 19. s. 11. on which the question turned :

“ And for that it often falls out that many persons, before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are *reputed* the owners thereof, and dispose of the same as their own : be it enacted, that if at any time hereafter any person or persons shall become bankrupt, and, at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels, whereof they shall be the *reputed* owners, and take upon them the sale, alteration, or disposition, as owners ; that in every such case the said commissioners, or the greater part of them, shall have power to sell and dispose of the same to and for the benefit of the creditors which shall

seek relief by the said commission, as fully as any other part of the estate of the bankrupt.”

21 Jac. I. c. 19. § 11.

The cases upon this section are very numerous. Those that bear upon the present point will be shortly referred to.

Where by contract between *B.* and the defendant, *B.* agreed, on payment to him of a sum certain, to convey to the defendant a dwelling-house, and to deliver possession of all the household furniture and stock, and that after formal possession delivered to the defendant, *B.* should be allowed to remain in possession for three months without paying rent ; which agreement was notorious in the neighbourhood, and the money was paid by the defendant, and a formal delivery made to him, and *B.* afterwards left in possession according to the agreement, who became bankrupt whilst he so remained in possession, and before the expiration of three months.—

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Held, that this was not a possession by the bankrupt within the statute 21 Jac. I. c. 19. § 11.  
*Muller v. Moss*, 1 M. and S. 335.

For other cases on the statute, see *Ryal v. Rowles*, 1 Atk. 158. and *Gordon v. East India Company*, 7 T. R. 228. 1 Atk. 164. *Stephens v. Solc*, 1 Ves. 352. 2 T. R. 587. 594. 1 Atk. 165. *Jackson v. Irwin*,

2 Campb. 46. 1 P. Wms. 318. *Ex parte Marsh*, 1 Atk. 158. *West v. Skip*, 1 Ves. 239. *Mace v. Cudde*, 1 Cowp. 232. 1 Bos. and Pul. 83. *Livesey v. Hood*, 2 Campb. 83. 7 T. R. 228. *Darby v. Smith*, 8 T. R. 82. *Horn v. Baker*, 9 East 215. *Longman v. Tripp*, 2 N. R. 67. *Jones v. Dwyer*, 15 East 21.

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## FAIRLIE v. CHRISTIE.

**T**HIS was an action on a policy of insurance, on any ship or ships "sailing on or before the 10th of October, 1814." After the policy was effected, some of the underwriters consented, upon the request of the broker, to alter it to a period "on or before the 31st of December." The defendant did not consent. The warranty to sail on the 10th of October was in the body of the policy; and when the alteration, which was introduced in the margin, was made, the words "10th of October" were struck out with a pen.

A policy of insurance is altered by striking out the words in the body of the policy, which contained a warranty to sail at a certain time, and inserting a memorandum of an enlarged time in the margin. Some of the underwriters consented to the alteration; but the defendant did not consent. In an action upon this policy, Held, that the alteration did not avoid the policy. *Sed quare.*

*Best*, serjeant, and *Campbell*, for the defendant, objected, that the policy was rendered void by this alteration. This is not an alteration made in furtherance of the intention of the parties at the time of the contract; neither is it the correction of a mistake. It is the substitution of a new contract for one previously complete. It is, therefore, void on two grounds:—1. The contract is varied without the consent of the defendant. 2. It is an evasion of the stamp laws. They relied on *French v. Patton*, 9 East 351.

*Gibbs*, C. J.—A policy of insurance is not an instrument like a bond or a bill of exchange. A bond or a bill of exchange would have been void by such an alteration; but a policy of insurance is an instrument of a peculiar nature. It is not ne-



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gotiable; it does not pass from hand to hand like money. In *French v. Patton*, the policy was altered by the consent of all parties, and thus one contract was substituted for another. The second contract would have been good but for the stamp laws; and the plaintiff was not permitted to resort to the first, having merged it in the second. But here I think the alteration may be considered as a proposal made by the assured to the underwriters, which, if acceded to, was to be the contract between them; and, if not adopted by any underwriter to whom it was shewn, the policy was to remain in its original state as to him. I am inclined to think the plaintiff entitled to recover. But I will give the defendant leave to move to enter a nonsuit.

*Shepherd, S. G. and Puller, for the plaintiff.*

*Best, serjeant, and Campbell, for the defendant.*

With respect to alterations in policies of insurance, the 35 Geo. III. c. 63. s. 13. permits them under certain qualifications: the words are, "That nothing in this act contained shall extend, or be construed to extend, to prohibit the making of any alterations, which may lawfully be made in the terms or conditions of any policies of insurance, duly stamped as aforesaid, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such

alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10s. *per centum* on the sum insured; and so that the thing insured shall remain the property of the same person or persons, and so that such alteration shall not prolong the term insured beyond the period allowed by this act, and so that no additional or further sum shall be insured by reason or means of such alterations."

Upon this clause it has been determined, that if a policy has been executed in the printed form, without any specific subject of insurance being inserted in writing, and the subject matter is afterwards added in writing, and the addition signed by some of the underwriters only, the assured cannot recover against those underwriters who do not sign the contract as it stands altered by the insertion. *Langhorne v. Cologan*, 4 Taunt. 330.

So, where a policy of insurance having been underwritten on "*ship and out-fit*," was, after the ship sailed, declared, by the consent of all parties, to be on *ship and goods*," by a memorandum written on a blank space in the body of the policy, but without any new stamp, it was decided that, for want of the stamp, the plaintiff could not recover as upon a policy on ship and goods, as declared by the memorandum, *Hill v. Patton*, 8 East 373. And, in a subsequent action on the same policy, it was held that the plaintiff could not recover upon the policy, in its original state, as an insurance on ship and *out-fit*, by reason of the alteration apparent on the face of the instrument, and which was made by parties inter-

ested, *French v. Patton*, 9 East 351.

But a mistake made by the agent in declaring the interest in the margin of the policy to be on a ship, by the wrong name, may be rectified by inserting the true name, without a fresh stamp, *Robinson v. Thouray*, 1 M. and S. 217.— And upon the same principle that the intention of the parties is to be considered, and that where there is a mistake in the first contract, by reason of which it becomes no contract at all in the sense in which it was intended, it has been decided, that the alteration of the subject matter does not require a new stamp. As, where a broker, instructed to effect a policy on goods, effected it on ships. The mistake was afterwards rectified by the underwriters subscribing a memorandum in the margin; and the Court held that no new stamp was necessary, *Sawtell v. Loudon*, 5 Taunt. 359.

The 13 sec. of the 35 Geo. III. c. 63. does not avoid a policy for any alterations which may be made in the terms and conditions, provided they may be *lawfully* made. The wording of this section is certainly ambiguous; but the three requisites to sustain an

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altered policy, are—1. That the thing insured remain the property of the same person, &c. 2. That the alterations be made before any notice of the determination of the risk. 3. That the premium of insurance exceed 10s. *per cent.* Therefore, in *Hubbard v. Jackson*, 4 Taunt. 169. a memorandum indorsed on a policy,

by which the underwriter, for an additional premium, before the risk commenced, absolved the assured from a warranty of sailing on a particular day, and exchanged a summer risk for a winter risk, was held not to avoid the policy, being within the 35 Geo. III. c. 63. § 13. See likewise *Kensington v. Ingalls*, in error, 8 East 273.

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## TOUSSAINT v. HARTOP.

**T**HE plaintiff was a judgment creditor of *Hogg*, a bankrupt. The defendant was one of the messengers of the commissioners of bankrupts; and this was an action of trespass, for removing goods which the plaintiff had taken in execution, by virtue of a judgment against *Hogg*. The judgment bore date *December*, 1814. The writ was tested on the last day of *Michaelmas* Term, 1815; and the levy was made upon *Hogg's* goods on the 28th of *January*. Goods to the amount of 482*l.* were seized. The plaintiff's attorney gave directions to the sheriff's officer not to sell. When he levied, he left a man in possession with the warrant. Notwithstanding the levy, *Hogg* remained in the house, and carried on his trade of a publican as usual, till a commission of bankrupt issued against him, bearing date the 18th of *May*, 1816, and founded upon an act of bankruptcy committed on the 29th of *March* preceding. The messenger took possession of the goods under this commission; and this action was brought for the trespass.

*A.* levies an execution on the goods of *B.*, a trader. He directs the sheriff's officer not to sell, but to leave a man in possession with the warrant. *B.* carries on his trade as usual; and, five months afterwards, becomes a bankrupt. Held that, notwithstanding the execution, and the possession of the officer, the goods seized passed to the assignees, by virtue of the statute of 21 James, c. 19. s. 11.

*Lens*, serjeant, for the defendant, (having previously stated that his case was to prove *Hogg* a bankrupt,) contended, that, if he should succeed in his defence, the defendant was entitled to a verdict. Notwithstanding the levy, the goods are left in the

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visible ownership, and under the sole and exclusive controul, of *Hogg* the bankrupt. It was concealed from the neighbourhood that an execution had been levied, and a consequent change of property produced by the effect of the writ. The creditor had thereby concurred with the bankrupt to delude the world in respect to his circumstances, and had thus waved the benefit of his execution, *Jackson v. Irwin*, 2 Campb. 48.

**GIBBS, C. J.**—I feel no hesitation in expressing my opinion on this point, although the case cited differs from the present. The warrant, in that case, was directed to the *servant* of the trader, and the possession of the servant was held to be the possession of the master. In the present case, a regular officer is sent into the premises; but it is concealed from the world that an execution was levied. The law has commanded the sheriff to levy; the plaintiff steps in, and retards the execution of his own writ: he permits the bankrupt to carry on business for a length of time, and to act as the visible owner of those very goods upon which he had levied. This is directly within the mischief of the act of James: the bankrupt is found at the time of the commission in the reputed ownership of the property.

In the sequel of the case, some difficulty arose upon the proof of the petitioning creditor's debt: that part of the case was referred; but the point of law, above stated, was considered as decided by the Lord C. J.

*Best* and *Blossett*, serjeants, and *Holt*, for the  
plaintiff.

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*Lens*, serjeant, and *Lawes*, for defendant.

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See the cases cited in *Gurr v. Rutton*, *ante*, p. 330. .

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## LITT and Another v. COWLEY and Others.

*A.*, in London, orders goods of *B.*, at Manchester; *B.* forwards them by a carrier to London. Whilst they are on their transit, *B.* hears of *A.*'s insolvency, and directs the carriers to stop them; and, for this purpose, he makes out a new invoice to *D.* which he transmits to the office of the carrier in London. The goods, by a mistake of the carrier, are delivered to *A.* who becomes a bankrupt: his assignees claim to retain them: Held that *B.* had a right to recover them in an action of trover against the assignees of *A.*

**T**ROVER for 200 pieces of cotton goods.—The plaintiffs were manufacturers at *Manchester*, and the defendants assignees of *Neale* and *Warner*, bankrupts, who carried on business in *London*. In November 1815, the cotton was ordered by *Neale* and Co. with whom the plaintiffs dealt. The goods were delivered on the 9th of *December* to Messrs. *Pickfords*, who are carriers, to be conveyed from *Manchester* to *London*, addressed to *Neale* and *Warner*. Two days after the delivery to *Pickfords*, the plaintiffs were informed that *Neale* and *Warner* were in insolvent circumstances. *Neale* and *Warner* had not paid nor given bills for the goods: plaintiffs, accordingly, sent an order to *Pickfords*, at *Manchester*, to stop the goods. The carriers have an establishment at *Manchester*, and an establishment with wharfs at *Paddington*. The establishments at *London* and *Manchester*, respectively, send each day a list of invoices of goods received at either establishment. A copy of the invoice of the goods received on the 9th at *Manchester* was sent to the town establishment, by which they were informed that the goods in question, addressed to *Neale* and *Warner*, would arrive by a certain boat, and at a certain time, in *London*. Previous to the arrival of the boat, the house in *London* received from the house in *Manchester* a notice, signed by the plaintiffs, by which

*Pickfords* were directed not to deliver the goods to *Neale* and *Warner*, but to *Birket* and *Scholefield*.

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In consequence of this change, the names of the latter were introduced into the invoice, and the names of *Neale* and *Warner* struck out.

When the package of cotton arrived, it was with the original address to *Neale* and *Warner*. No invoice was found with their address; but the invoice was made out in the names of *Birket* and *Scholefield*. The porters, imagining that a mistake had occurred amongst the clerks at *Manchester*, in putting the names of *Birket* and *Scholefield* in the invoice, instead of *Neale* and *Warner*, delivered it to the latter on the 24th of *December*. *Neale* and *Warner* became bankrupts; the defendants were chosen assignees, and sold the goods on the 5th of *March* following: this action was brought to recover the value.

*Shepherd*, *S. G.* and *Parke*, for the plaintiffs, contended—1. That they had a clear right to stop in transitu: the goods were on their transit when the countermmand was given to the carriers; that countermmand, followed as it was with an actual attempt on the part of the *Pickfords* to re-vest the property in the plaintiffs, was a sufficient re-possession to enable them to maintain trover. 2. The mistake of the porter in delivering the goods could not defeat the right which the plaintiffs had previously exercised to stop them. If the servant of *A.* deliver goods to *B.* by mistake, which are intended



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for C., A. may recover against B. in an action of trover.

*Best, serjeant, contra.*—The goods came to the possession of the vendee by a regular transit. The right of stoppage *in transitu* is an equitable right; but it cannot countervail a legal possession. If the servant of *Pickfords* have made a mistake, the plaintiffs have their remedy against *Pickfords*.

GIBBS, C. J.—The law, with regard to stoppage *in transitu*, has undergone several alterations at different periods. It has never been doubted but that the goods vested in the vendee, as soon as they left the original owner's possession: but it has always been equally certain, that the owner might retake his goods, on their passage, by any means short of felony, if he had subsequent grounds for believing that the purchaser would not perform his part of the contract by paying for them. The consequence of this conflicting doctrine was, that the property was left to depend upon the discretion of the carrier; and it thus gave rise to a great deal of fraud and violence. In process of time, a principle of greater equity was adopted; and the carrier himself became liable, whenever his conduct appeared to be that of a wrong doer. But there is nothing in this case which fixes Messrs. *Pickford* and Co. with any thing but an unavoidable mistake. Under these circumstances, I think, the plaintiffs have been sufficiently in time in revoking their first orders: they must, therefore, recover, from the assignees of the bankrupt such portion of the

goods as remained undisposed of after the commission of bankrupt. But as the counsel for the defendants seem to entertain doubts upon my interpretation of the law upon this subject, I have no objection to the point being brought before the the Court upon motion.

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*Solicitor General and Parke, for plaintiffs.*

*Best, serjeant, and Comyn, for the defendants.*

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This case was moved in the ensuing term, and a rule to shew cause was granted, &c. But, upon hearing the plaintiffs' counsel, the Court discharged the rule, and unanimously adopted the opinion

given by the Lord Chief Justice at the trial.

For cases on the right of stoppage *in transitu*, see *Withers v. Lys*, ante, p. 18. and *Craven v. Ryder*, ante, p. 100 to 105.

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## GOURT and Others v. HARDEN and Others.

*A.*, in *London*, acts as the agent of *B.* and *Co.* at *Paris*, for a small commission upon their general business. *B.* and *Co.* request *A.* to remit them a bill on *Portugal*, which *A.* accordingly does, and indorses it. The indorsement being without qualification, *A.* is liable upon the bill, in an action brought against him by *B.* and *Co.*

2. If a bill is drawn payable at so many days after sight, there is no fixed time when it shall be presented to the drawee; and it may be put into general circulation by the holder without a previous presentment.

3. *Semble*, that a presentment must notwithstanding be made within a reasonable time.

**T**HIS was an action by the holder of two bills of exchange against the defendants as indorsers, drawn 15th of *May* 1815, by *De Franca* and *Co.*, to the defendants' order, upon *Gould* and *Co.* of *Lisbon*, at thirty days' sight. The bills were indorsed by defendants to plaintiffs.

The plaintiffs were merchants at *Paris*; and the defendants acted as their general agents in *London*. In *May* 1815, the plaintiffs requested the defendants to remit them £600l. on *Portugal*, at seventy-two days. The defendants, in compliance with this request, remitted the bills by post. At that time the house of *De Franca* and *Co.*, the drawers, was in great credit, and continued solvent until the middle of *July*. The bills were immediately put into circulation by the French house; and it appeared that they had been in negotiation on various parts of the continent. The defendants heard no more of the bills until the 12th of *October*, when a letter was written by the plaintiffs to the defendants, informing them that *Gould* and *Co.* had refused to accept them, and demanding payment of the defendants. It was in evidence that the defendants acted as agents for the plaintiffs, for a small commission, and not upon a *del credere*.

*Lens*, serjeant, for the defendants.—There are

two objections to this action: the defendants acted as agents to the plaintiffs. They indorsed the bills for the purpose of remitting them, and not with a view of becoming responsible. Undoubtedly the indorsement was general: but the situation of the parties may be explained by evidence; and it was apparent in this case, that they did not mean to guarantee the bills, but merely to discharge the duty of an agent.

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2. The plaintiffs have been guilty of laches. The bills were payable at thirty days' sight. If they had been sent to *Gould* and Co. with due diligence, and he had refused to accept, upon notice of the dishonour to the defendants; they might have recovered against the house of *De Franco* and Co., which continued solvent more than two months from the date of the bills: but, instead of transmitting the bills in the ordinary way to *Lisbon*, they are sent into general circulation, and the defendants hear nothing of the transaction till five months after their indorsement.

*Best*, serjeant, for the plaintiffs.—The defendants have not restricted their liability by any special indorsement; they have become parties to the bills without any qualification, and are therefore liable upon them. With respect to the second objection, as the bills are payable at so many days after sight, there is no time within which the holder could be limited to present them for acceptance.

*Gibbs*, C. J.—With respect to the first objection, I think it is no defence to the action: The

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defendants have indorsed without any qualification. The question of agency does not fairly arise in this transaction. If the plaintiffs had considered the defendants to be acting as agents; still when they read their names upon these bills as indorsers, they had a right to consider that they intended to make themselves liable as principals.

As to the second objection, the distinction is between bills payable at a certain number of days after date, and bills payable at a certain number of days after sight. In the former, the holder is bound to use all due diligence, and to present such bill at its maturity: but, in the latter case, he has a right to put the bill into circulation before he presents it; and then of course it is uncertain when it will be presented to the drawee. It is to the prejudice of the holder if he delays to do it; he loses his money and his interest. There are *dicta* that it ought to be done in a reasonable time.

Verdict for plaintiffs.

*Best*, serjeant, and *Campbell*, for plaintiffs.

*Lens* and *Vaughan*, serjeants, and *Marryatt*, for defendants.

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In the ensuing term, *Best*, serjeant, moved for a rule to shew cause, why there should not be a new trial. The Court refused the rule, adding, that they entirely concurred in the

opinion of the Lord Chief Justice.


The purchaser of a foreign bill of exchange, payable at a certain time after sight, which is publicly offered for negocia-

tion, is *not* bound to send it by the earliest opportunity to the place of its destination. *Muileman v. D'Eguino*, 2 H. B. 565; and see *Darbyshire v. Parker*, 6 East 3. There is no fixed time when a bill drawn payable at sight, or a certain time after, shall be presented to the drawee: but it must be presented within a *reasonable* time; and what is a reasonable time is a question

for the jury to decide on the circumstances of the case. 2 H. B. 565. But *semble*, if the holder of a bill, so payable, neither presents it, nor puts it in *circulation*, he is guilty of *laches*, and cannot recover upon it. Ibid. 567. In the French ordinances of 1673, in *Postlethwaite* and *Marius*, it is said, "that a bill payable at sight, or *at will*, is the same thing."

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GERALDES the amount of weight agreed  
v. for in the contract, the mer-  
DONISON. chant is not concluded by the  
*sale*, as it were, of the foreign  
weight ; but may demand what  
is deficient of his equivalent in  
English weight. It is unneces-  
sary to adduce any authority,  
and still less to assign any rea-  
son, for a rule founded on such  
manifest justice. The mer-  
chant stipulates for a weight  
certain, no matter by what  
denomination ; and he is not to  
have less than his contract.

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## HEDBERGH and Another v. PEARSON.

**T**HIS was an action on a policy of insurance upon sugars: the voyage was from *Gottenburgh* to *Stralsund*. As the ship was proceeding on her voyage, she struck upon a sunken rock, and sprang a leak. She had several hogsheads of sugar on board; but, with the exception of the amount of a single hogshead (composed of parts of several, in each of which a small portion was undamaged,) her whole cargo was destroyed by seawater. The policy was warranted free of particular average, and the plaintiffs claimed a total loss. There were some other points in the cause relative to the ship's delay, and her omission to sail with convoy; but they were not material.

Sugars are insured, free of particular average. The whole cargo, consisting of 54 hogsheads, is so far damaged by seawater, that the amount of what is safe and undamaged, as collected from the several hogsheads, does not exceed one entire hogshead. In an action against the underwriter for a total loss, held, that the memorandum in the policy, free of particular average, protected him from all liability.

*Best*, serjeant, for the defendant, contended, that this was not a total loss. The underwriters have guarded themselves, by the terms of the policy, from particular average. It is neither a total loss as respects the whole cargo, nor as respects any part. Every hogshead of sugar had some portion, however small, remaining undamaged. It was well known that corn, fish, and sugar, were seldom insured without exemptions of this kind.

*Lens*, serjeant, *contra*. It is so near a total loss, that, in the understanding of merchants, it must be deemed one, though the whole cargo be not *literally* lost. Besides, there may be a total loss of a



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part; and one hogshhead saved out of fifty-four cannot be called an average loss. He cited *Davy v. Milford*, 15 East 559.

GIBBS, C. J. This is a nice point. I am inclined to think it an average loss, and that the defendant is not responsible. The principle upon which this memorandum is introduced into policies is, from the peculiar nature of the commodity, which is liable to damage from a small admixture of sea-water. The underwriters, therefore, meant to guard themselves from every risk short of a total destruction of the subject of insurance. The case cited was an insurance on flax. The Court of King's Bench, in that case, thought that the assured had a right to recover for that part of the flax which was totally lost; but not for the rest which was saved in specie, though deteriorated. The subject was capable of division, and they construed the policy *divise*. But the cases do not resemble each other. Some of the bales of flax were actually lost; some only damaged. Here *every* hogshhead contains some portion of sugar; and I cannot distinguish between a small part or a large part being saved, if the loss be occasioned by that very species of deterioration, which it was the object of the underwriters to protect themselves from, by this memorandum. I should wish to have the point discussed, and will reserve it.

The Jury, notwithstanding, found a verdict for the defendant, stating that it was their unanimous opinion, that it was an average loss only; and that

the words in the policy guarded the underwriter from liability.

*Lens*, serjeant, and *Campbell*, for the plaintiffs.

*Best*, serjeant, and ———, for the defendant.

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In *Davy v. Milford*, the Court of King's Bench thought, that the policy might be construed *divise*; that is, that as to the part of the flax which was not saved from the wreck, there was a total loss, and as to that which was saved, but damaged, it was a partial loss.

But where there was an insurance on goods in a ship, by name, until the same should be discharged and landed, in which was the following memorandum, *rice, free of particular average*, and the ship with rice and other goods arrived within the limits of the port, but before she could be

brought to her moorings, or be at all unloaded, ran aground, and was wrecked, and the whole cargo was greatly damaged, and was taken out of her in a craft, and carried to the consignees and sold; and produced, upon the whole, little more than sufficient to pay freight and salvage, but the rice did not yield sufficient to pay the freight: Held, that this was a case of particular average only; and, therefore, as to the rice, the underwriter was exempted by the warranty. *Glennie v. The London Assurance Company*, 2 Maule and Selw. 371.

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## BUNN and Another v. MARKHAM and Wife.

To make a gift valid as a *donatio mortis causâ*, actual delivery of possession is necessary, and a symbolical delivery is not sufficient. Therefore, where *A.*, considering himself dying, takes certain property out of an iron chest, and writes the names of plaintiffs upon an envelope containing it, declaring it to be his intention that they should have such property upon his death; and, after having superscribed the envelope with their names, returns it to the chest, and keeps the keys in his own possession, never making any actual delivery thereof to the plaintiffs themselves, or to trustees for them: Held, that such a gift, or designation of the property, was not good and effectual as a *donatio mortis causâ*.

**T**HIS was an action of trover.—Sir *Jervoise Clifton* had two natural children, one of which was the present plaintiff. He died in *September* 1815, having very liberally provided for them by his last will. The present action was brought to recover some bank notes, &c. which the plaintiffs claimed of the defendant, a daughter and legatee of Sir *Jervoise*, as a *donatio causâ mortis*. The circumstances were these:—Several months previous to his death, Sir *Jervoise* was in a bad state of health. On the 24th of *March*, being confined to his bed, he desired his natural son to take the keys of an iron chest, which were in the drawer of a table in his bed-room; and to fetch some money which was there in a tin box, and a parcel of one pound notes. Being brought to his bed-side, he counted them over; the money and notes altogether amounted to 3,830*l*. He then desired the young man to separate them from the other valuables in the tin box; to put them in some paper; to seal them up; and to direct them for his mother and sister, in the names of “Mrs. and Miss *Clifton*.” This was done in the presence of Sir *Jervoise*; and he charged his son to see them delivered to his mother and sister after his death, which he believed to be near at hand. The parcel, thus sealed, was then taken back to the iron chest and locked up, together with other papers, and the keys returned to Sir *Jervoise*

*Clifton*, who desired them first to be sealed up, and then to be replaced in his drawer. Mrs. and Miss *Clifton* were not at this time in the house; but Sir *Jervoise* frequently said, that "the money in the iron chest" was meant for them; and, upon their arrival at *Clifton* Hall, he told them what he had done. There was a good deal of evidence to shew that, during the interval between this occurrence and the death of Sir *Jervoise*, the keys were frequently in the possession of Mrs. *Clifton*. But no actual delivery was made, either to the young lady or to her mother, nor to any other person, of the parcels superscribed for them; and Sir *Jervoise*, except upon some incidental occasions, always kept the keys till the day of his death; previous to which he directed them to be given to his executors. By a will, bearing date *May* 1814, Sir *Jervoise* left Mrs. *Markham*, the defendant's wife, and his legitimate daughter, "all the cash, bank notes, India bonds, &c. which should be found in his possession at *Clifton* Hall, or wheresoever he should happen to die." He likewise gave to Mrs. *Clifton*, alias *Bunn*, 6,000*l.*; to his natural son 10,000*l.*; and to his natural daughter 2,000*l.* It appeared likewise, that upon the day of the gift in question, and subsequent to it, he had added a codicil to his will, by which he further provided for Mrs. and Miss *Clifton*, expressing himself in one clause to this effect: "and I hereby ratify and confirm my will in all things."

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*Shepherd*, S. G. for the defendants, contended, that, confining himself to one point only, the plaintiffs were not entitled to recover. 1. Upon prin-

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ciples of law this was not a good *donatio causâ mortis*. Delivery, in all cases necessary to perfect a gift, was more emphatically called for in a donation of this kind. The mere setting apart a paper, and directing it, could not operate as a transfer. Neither was there in this case a constructive delivery of the money and notes. The keys, the symbol of possession, remained in the custody of Sir *Jervoise* up to the time of his death. This specific property, in the words of the will of *May* 1814, was bequeathed to Mrs. *Markham*. 2. After the donation Sir *Jervoise* makes a codicil to his will, by which he further provided for Mrs. and Miss *Clifton*. This subsequent provision might be considered as a substitution for the bank notes and money in the iron chest. Had he died before he had been able to make this codicil, the reason in favour of the donation might have been stronger; but he lives to make new codicils, and to bestow new legacies, and makes no mention of the money and the notes in his will.

*Best*, serjeant, *contra*.—This is a good *donatio causâ mortis*. It is true that a parol gift, without some act of delivery, will not alter the property; but the law looks rather to the intention of the donor than to the formality of circumstances. Supposing delivery to be necessary in all cases, a virtual delivery would suffice. An actual delivery of the thing itself could not be necessary, because some things are not capable of transfer, *ex manu in manum*. But, in the present case, there was a delivery, in substance, by Sir *Jervoise* to his son, as trustee for his mother. The keys, indeed, re-

mained in Sir *Jerroise's* general custody, because he had other property in the iron chest; but the direction on the papers, and the setting of them apart, coupled with the other circumstances of the case, were equivalent to an executed transfer. He relied on *Smith v. Smith*, 2 Strange 956, in which a mixed possession was deemed sufficient.

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GIBBS, C. J.—Few cases have occurred upon this subject in courts of common law. When they present themselves, we must canvass them upon those principles which obtain respecting them in the courts of equity, where they have often been discussed. Whatever might be the intention of Sir *Jerroise Clifton*, I cannot think that he has given the plaintiffs a legal title to this property. Can we call this a *donatio causá mortis*? To constitute a title of this kind, which this is, or nothing, the donor must not only give, but deliver; and that delivery must be actual, where the subject matter of the gift, as in the present case, is capable of actual transfer. A symbolical delivery will not do. This was so determined by Lord *Hardwicke* in *Shargold v. Shargold*, 2 Vesey 431. A delivery of receipts for South Sea Annuities, in the donor's last illness, and expressly in contemplation of death, was held by that learned Judge, and higher authority cannot be cited, not to be a good *donatio mortis causá*. But even the symbol of possession does not, in this case, pass to the donees, or to any one in trust for them. The keys of the iron chest, and the property therein deposited, remain with the testator up to the time of his death. He had frequent opportunities after the time of the

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alleged donation, to perfect the gift to the plaintiffs. He does not. He dies, with the property, and the symbol of the property, both in his possession. I cannot, upon legal principles, call this a good *donatio causâ mortis*. But it is fit that my opinion should be reviewed.

The Jury found a verdict for the plaintiffs, subject to the question of law, whether it was a good *donatio causâ mortis*.

*Best, Vaughan, and Blossett*, serjeants, and *Richardson*, for the plaintiffs.

*Shepherd, S. G. Lens*, serjeant, *Harrison*, and *Copley*, serjeant, for the defendants.

In the next term this case was fully discussed, upon a rule to shew cause why a nonsuit should not be entered. The Court of Common Pleas unanimously approved of the opinion of the Lord Chief Justice, as expressed at the trial; and directed a nonsuit to be entered.

Questions upon a *donatio mortis causâ* have seldom arisen in the trial of an action at common law. It is thought proper, however, to make some additional observations to the note upon the case of *Spratley*

v. *Wilson*, *supra*, p. 10, in which some points of this branch of law were canvassed; and more particularly with a view to define the jurisdiction under which our courts may be considered as having power to take cognizance of this question.

Before we enter upon the question of jurisdiction, it may be proper to add a word or two upon the nature of the *donatio mortis causâ*, the principles of which are *wholly* derived from the Roman civil law. The more ancient Roman expounders of the law

had great differences of opinion; but such differences are to be considered as settled by the text in the Institutes.—*Mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia.* Inst. lib. 2. t. 7. *Mortis causâ*, &c. Vinnius in his Commentary upon this law says, *cæterum non simpliciter et per omnia, sed xara ti, et maxime ratione effectorum.*—The following are the distinctions:

1. That the *donatio mortis causâ* is absolute by the death of the donor, without revocation; whereas the legatary interest vests by the acceptance of the *hæres scriptus*.

2. That delivery to, and acceptance by, the donee are absolutely necessary; and when the subject of gift is actually delivered and accepted, a dominion in the *thing* passes to the donee, enabling him to dispose of it in the mean time. Dig. 39. tit. 6. l. 14. & l. 39.

These two principles seem to be the grounds which exclude our spiritual courts of jurisdiction, which has been decided in *Thompson v. Batty*, Strange, Rep. 777, upon a motion for a prohibition, when it was said, the question may be tried in an action of trover. How an action at law can arise where this question is directly

in issue, may be collected by the authorities cited in Viner's Abridgment, tit. Gift; in the cases of gift absolute, and, by analogy, in cases of gift *sub modo*. An instance is there cited of the case of the gift of a jewel, in expectation of marriage, and an action to recover it upon failure of the marriage taking effect. And leaving out of view the technicality of the Roman civil law, and adopting only the principle that the property vests in the donee, but is capable of being revested in the donor at his will, the technical principles of our common law actions may suffice to decide questions of property arising upon a gift in contemplation of death.


It is a remarkable circumstance that our Law and Equity Reports are silent upon the subject of *donatio mortis causâ* until the case of *Jones v. Selby*, in 1710. Since that time there has been a series of decisions in the Courts of Equity, turning upon some very nice distinctions. The principal cases are referred to; and the reasons upon which they were adjudged are examined, in the note to *Spratley v. Wilson*, ante, 11, 12. Wood, in his Institutes of the Law of England, does not point out any trace of this question having

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arisen in our Courts in his time, although he must have been well aware of it as a branch of the civil law. Swinburne on Wills, p. 12, gives only what he has borrowed from the Digest, with an opinion how this gift is restrained by the stat. of Eliz. against fraudulent conveyances. But if we are to adhere strictly to the rules of the Roman civil law, it is unnecessary to resort to the aid of the statute of Eliz. for this principle; for that law, founded as it is upon the most admirable equity, would not allow donations of

this description to defeat the just claims of creditors against the general property of the deceased donor. Dig. 39. tit. 6. l. 17. But there is nothing to shew how this branch of our law was acted upon by our Courts in his time. The commencement of the cases upon this head seems to have been the effect of that part of the statute of frauds which relates to nuncupative wills; they appear to be a struggle to support, in courts of equity, claims which, but for the statute of frauds, would have been brought forward in the spiritual courts.

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SITTINGS AFTER MICHAELMAS TERM, 57 GEO. III.  
AT GUILDHALL.

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BENNETT and Another v. MORTA.

Dec. 6.

**T**HIS was an action on the case, which was brought by the plaintiffs, who were the owners of the ship *Ranger*, against the defendant, captain of a brig called the *Carvaltoo*, for running foul of their vessel in the River *Thames*.

It appeared that the *Ranger* took a pilot on board, off *Gravesend*, to navigate her to her mooring near *Rotherhithe*; that, immediately after the *Carvaltoo* had swung to her anchor, the defendant's brig turned a point of the River *Thames*, opening to *Limehouse-reach*, with too great a press of sail; and that she did not take in her sails, and let go her anchor, with sufficient expedition, to prevent her running foul of the *Ranger*, which she struck on her larboard fore chains, doing considerable damage to her hull. It appeared, however, that there was an old and experienced pilot on board the *Carvaltoo*.

The general pilot act (52 G. III. c. 39.) extends, not only to the sea and the shores of the sea, but to navigable rivers. If an accident occur by the running down of the plaintiff's vessel, whilst a pilot is lawfully on board the vessel of the defendant, the latter is exonerated from all responsibility; being divested of his authority in the ship, *pro tempore*, by the presence of the pilot. But the captain would be responsible for any mischief directly moving from himself.

*Lens*, serjeant, for the defendant, objected that

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the present action could not be maintained; that the *Carroll* had a pilot on board; that the authority of the master was thereby divested, and he was not responsible where he had no controul. He relied on the 52 Geo. III. c. 39. s. 30. " Provided that no master or owner of any ship or vessel shall be answerable for any loss or damage; nor shall any owner or owners of any ship or vessel, or consignee of goods, be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any other ship or vessel, or any cargo on board of the same, for or by reason or means of any neglect, default, incompetency or incapacity of any pilot taken on board of any such ship or vessel under or in pursuance of this act."

*Best*, serjeant, *contra*.—1. The act does not extend to ships in the River *Thames*. The act was intituled " An act for the more effectual regulation of pilots and pilotage of ships and vessels on the coast of *England*." Now, the term coast was properly confined to the shores of the sea. Had rivers been intended, would not the act have used the characteristic word, *banks*? 2. That the statute did not prevent an action being brought against the captain; and that, at any rate, to exculpate the captain, it should be shewn that the accident arose from the negligence or incapacity of the pilot.

GIBBS, C. J.—Upon referring to the second section of the act, I am of opinion that it manifestly

extends to the River *Thames*. In this case it is in evidence that a pilot was on board, by which the responsibility of the captain was divested; unless indeed there was direct proof that the mischief was immediately imputable to the captain. The ship and management of the ship belonged, *pro tempore*, to the pilot; and the captain cannot be responsible when he ceased to act; I shall therefore direct a nonsuit.

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*Best*, serjeant, and *E. Lawes*, for plaintiffs.


*Lens* and *Vaughan*, serjeants, for the defendant.

See *Boucher v. Noidstrom*, 1 Taunt. 568. *Nicholson v. Mounsey*, 16 East 384. See likewise *Carruthers v. Sydebotham*, 4 Maule and Selw. 77, in which it was held, that where the captain of a vessel took on board a pilot by virtue of the Liverpool Pilot Act (which incorporated the general provisions of the 52d Geo. III. c. 39.) and a loss happened, occasioned by the neglect of such pilot whilst the ship was under his conduct, the assured were not prevented from recovering an average loss upon a damage by stranding.

The same point was brought  
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before the Court of Exchequer in Hilary Term, 1815, in the *Attorney General v. Case*, and argued by the Solicitor General for the Crown, and *Joy* for the defendant: no judgment has hitherto been given in the latter case.

In *Carruthers v. Sydebotham*, the judgment of the Court of K. B. manifestly extends to a case in the same predicament with that in the text; that the master shall not be answerable for the act of the pilot whom he does not appoint; whom he is bound by law to receive into his vessel; and who, when on board, displaces his authority, and

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supersedes him in the temporary government of the ship. It would be in the highest degree unreasonable and unjust to make a master responsible where he had no controul. It was upon this principle that

the decision in *Nicholson v. Mounsey*, *supra*, proceeded. But, unquestionably, the captain would be answerable for any individual personal misconduct, in himself and crew.

1816.




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SITTINGS IN MICHAELMAS TERM, 57 GEO. III. 1816.  
AT WESTMINSTER.

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HEAD and Another v. SEWELL.

Nov. 8.

**A**CTION by the indorsee of a bill of exchange against the acceptor; drawn by one *Ander-son* on the defendant, and directed to him at *Somers' Town*, and accepted by the defendant, payable at Messrs. *Harrisons, Pickett-street, Temple-bar*.

In an action against the acceptor of a bill of exchange, made payable at a particular place, by a memorandum at the foot of the bill, it is not necessary to prove a presentment, or demand at that place, but the acceptor is generally and universally liable.

There was no proof of a presentment at the latter place.

*Best*, serjeant, objected, upon the authority of the case of *Gammon v. Schmoll*, 5 Taunt. 344.

*Vaughan*, serjeant, *contra*, contended, that it was not necessary to prove a demand at the particular place. He relied upon *Fenton v. Goundry*, 13 East 459.

**GIBBS, C. J.**—After thirty-five years' experience, in which I have never known this objection to prevail, I cannot admit the necessity of this proof. In an action against the acceptor, where the bill is accepted "payable at a particular place," as in the present case, it is not necessary to prove a

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demand at *that* place. He is *generally* and universally liable upon such an acceptance. It has been often so determined. I know there are conflicting cases; but I shall not require this proof.

*Vaughan*, serjeant, for the plaintiffs.

*Best*, serjeant, for the defendant.

C. B.

*Richards v. Lord Milsington.*

This was an action by the indorsee against the maker of a promissory note. The note was in the common form; but in the margin, and underneath the name of the maker, was written, "payable at *Bruce and Co.'s*." The declaration did not state that the bill had been presented at *Bruce and Co.'s*; and no evidence of that fact was tendered by the plaintiff's counsel.

*Vaughan*, serjeant, for the defendant, contended, that there was a variance between the instrument in evidence, and the instrument as stated in the declaration. He admitted the Court of Common Pleas had decided differently from the King's Bench; that such memorandum, though not introduced in the body of the bill, was a qualified undertaking;

that it was part of the contract, and constituted a condition precedent. It was necessary, therefore, to aver it in the declaration; and, unless the proof was dispensed with by the act of the defendant, it became incumbent upon the plaintiff to prove it. He relied on *Gammon v. Schmoll*, 5 Taunt. 344.

*Lens*, serjt. *contra*.—*Gammon v. Schmoll* was an action on a bill of exchange. This is an action on a promissory note, in which the words "payable, &c." are not incorporated in the bill, but merely introduced in the margin, as indicating the place of application for payment; not as qualifying the promise. It is a mere direction for the convenience of the maker. He added, that in *Price v. Mitchell*, Easter Term 55 Geo. III. 4 Campb. 200. his Lordship had decided, that such a memoran-

dum was no part of the promise.

GIBBS, C. J.—The words “payable at *Bruce and Co.’s*,” are not introduced in the body of the bill; they are only inserted in the margin. It is a mere memorandum, not coupled with, nor qualifying, the promise. Look at this instrument; and the promissory note is perfect without it. I say nothing as to any other case. I find I had already determined this point in *Price v. Mitchell*, and I feel disposed to preserve my own consistency. It would be difficult to say, in most cases, that what is law as regards bills of exchange should not be law as respects promissory notes.

*Vaughan*, serjeant, again urged the case of *Gammon v. Schmoll*, and pressed his Lordship to reserve the point.

GIBBS, C. J.—I am only deciding the case before me; but I feel too clear on the subject to reserve the point.

Verdict for the plaintiff.

*Lens*, serjeant, and *Scott*, for the plaintiff.

*Vaughan*, serjeant, for the defendant.

Upon this point the decisions in the Courts of King’s Bench and Common Pleas are at variance. Both Courts,

however, agree in this; that where a particular place of payment is introduced in the body of a bill of exchange; or where a promissory note is made payable at a *particular place*, in the express terms of the engagement, and not by way of *mere memorandum* at the foot of the instrument; that, in such case, the bill of exchange, and the promissory note (whether the action be against the maker or indorser of the one, or the drawer, indorser, or acceptor of the other,) must be presented at *that* particular place, and a demand be made *there*, in order to give the holder a cause of action. In such case, moreover, as respects a promissory note, the presentment and demand must be alleged in the declaration. *Bowes v. Howe*, in error, 5 Taunt. 30. *Saunderson v. Bowes*, 14 East 500. *Dickenson v. Bowes*, 16 East 110. *Howe v. Bowes*, 16 East 112. *Huffam v. Ellis*, 3 Taunt. 315. *Saunderson v. Judge*, 2 H. B. 509.

The two Courts are at variance upon this point; where a bill of exchange is made payable at a particular place, by way of *memorandum at the foot of the note*, such place not being embodied in the note. In *Callaghan v. Aylott*, the

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Court of Common Pleas decided, that where a bill was accepted payable at a banker's, it must be presented there for payment; and that the neglect *so* to present it, was equally a discharge to the acceptor as to the drawer. 3 Taunt. 397. So, in *Ambrose v. Hopwood*, 1 Taunt. 61, where a declaration alleged a bill to have been accepted payable at the house of certain persons at a particular place, it was held, upon special demurrer, necessary to aver that the bill was presented for payment at that place, and not to those persons generally. Such were the decisions in the Common Pleas, when the case of *Fenton v. Goundry* was argued upon a special demurrer to the declaration; and the Court of King's Bench were unanimous in opinion, that in an action against the acceptor of a bill of exchange, accepted, payable at *S. and Co.'s*, it was sufficient to allege *generally* a request by the plaintiff to the defendant to pay the bill, without alleging that it was presented for payment *at the particular place*. 13 East 459. In a subsequent case, *Gammon v. Schmoll*, the Court of Common Pleas, in opposition to the case of *Fenton v. Goundry*, determined, that if a bill was accepted payable at

a particular place, the plaintiff must aver performance of this, like other conditions precedent, by shewing a presentment to the acceptor at the place specified; *and that*, whether the action were against the drawer or acceptor. 5 Taunt. 344. The Courts, therefore, were at issue upon this point. In Trinity Term, 1816, the case of *Rowe v. Williams* came before the King's Bench, upon a special demurrer to a declaration upon a bill of exchange. That case was precisely the same as *Fenton v. Goundry*, *ante*. It was an action against the acceptor of a bill accepted "payable at Sir John Perring and Co.'s," and there was no averment of the presentment, when it became due, at Sir John Perring and Co.'s. The Counsel, in support of the demurrer, cited *Gammon v. Schmoll*, but the Court of King's Bench refused to hear the case argued; saying, that they considered the point as having been determined in their judgment in *Fenton v. Goundry*. Mr. J. Holroyd read a MS. note of the case of *Smith v. De la Fontaine*, tried before Ld. Ch. J. Mansfield, in 1785; in which his Lordship held, that words, accompanying an acceptance, "payable at a par-

ticular place," or the words "accepted, payable at, &c." were not words restricting or qualifying the acceptor's liability, but rendering him generally and universally liable, and that it was not necessary to prove a demand at the particular place in an action against such acceptor. Lord *Ellenborough* added, "that whatever cases might be adduced in favour of, or against, the doctrine laid down by K. B. in *Fenton v. Goun-dry*, an invincible argument

with him for the opinion *there* given was, the constant and undeviating usage of merchants; who never considered such an acceptance to be a restrictive acceptance; that it was mere matter of convenient arrangement, and did not raise any obligation, on the part of the holder, to demand payment at the particular place."

Upon this judgment a writ of error was brought in the House of Lords; and the case is now pending for judgment.

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Dec. 9.

RACKSTRAW v. IMBER.

1. Upon the dissolution of a partnership, and a mutual statement and settlement of accounts, there is an implied promise in law, on the part of him against whom a balance is found, to pay his copartner; and an express promise to pay is not necessary.

2. A partnership is commenced by articles unsealed, in which is contained an agreement for a co-partnership deed. Such partnership may at any time be dissolved by parol: and although one partner refuse to sign the deed, when tendered to him, he is not thereby precluded from recovering a balance due to him on the partnership account in an action of assumpsit.

**T**HIS was an action on an account stated. It appeared that the plaintiff and defendant had been in partnership as appraisers and auctioneers. The original partnership was contracted by articles, not under seal, which contained several provisions: 1. That a regular deed of partnership, with the usual covenants, should be drawn up. 2. A special clause; that, in case they should dissolve partnership within fourteen years from the commencement of the articles, neither should be at liberty to carry on the like business in any part of the united kingdoms within seven years next ensuing. No deed of partnership was entered into in pursuance of the articles; and the plaintiff and defendant, after carrying on business for some time together, agreed to a dissolution. In May, 1816, the dissolution was regularly advertised in the *London Gazette*. On the 25th of June following, they met together to adjust their accounts. At

this meeting the books were produced, and the plaintiff claimed of the defendant a balance in his favour of 215*l*. The defendant admitted the sum to be due; and offered to pay it, if the plaintiff would sign a deed which he tendered. In this deed was contained the restrictive articles as to carrying on the like trade within seven years. The plaintiff refused to sign the deed, and brought the present action for the money.

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v.  
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*Lens*, serjeant, for the defendant.—The plaintiff is not entitled to recover. In order to enable one partner to maintain an action against another for the balance of an account, two things must concur:—1. A dissolution of the partnership. 2. A clear and unconditional promise to pay. In the present case, notwithstanding the partnership might be considered at an end as to third persons, it was not dissolved by the parties themselves. The articles still exist; and either might call upon the other to enter into a deed of partnership. 3. The promise to pay the balance was modified by a condition—I will pay, if you will sign this deed; which you have agreed by the articles to sign. The undertaking, therefore, was not absolute, but conditional; and, allowing the partnership to be dissolved, there must be such an adjustment of accounts as would raise, by inference, a promise to pay. In the present instance, the promise is neither expressed nor implied.

*Best*, serjeant, *contra*, relied on *Foster v. Alan-*

1816. *son*, 2 T. R. 479. The partnership is dissolved ;  
and a balance is struck, which the defendant ad-  
mits to be correct. He is then required to pay,  
but he replies by producing the deed. The cove-  
nant, which he wished the plaintiff to sign, was  
illegal. It is contended that there is no express  
promise to pay ; none is necessary ; the account  
being settled, and the balance admitted, the law  
raises the promise.

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v.  
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GIBBS, C. J.—The plaintiff is entitled to re-  
cover. A partnership, which is formed by parol,  
may be dissolved by parol. The account having  
been settled between the plaintiff and defendant  
after the dissolution of the partnership, and a  
balance struck, the partner who has a balance in  
his favour has a clear right of action to recover  
it. The defendant insists that he will not pay  
unless the plaintiff executes a deed with a re-  
strictive covenant. He has no right to annex  
such a condition to his payment. My brother *Lens*  
mistakes in supposing that it is necessary that  
there should be an express promise. The action  
is not brought upon any express promise at the  
meeting of the 25th of *June* ; but upon the  
implied undertaking. This I consider to be suf-  
ficient. The dissolution of the pre-existing part-  
nership, and the mutual settlement of an account,  
are a sufficient consideration in law for an implied  
promise to pay a balance on the side of the part-  
ner from whom such balance is due.

Verdict for the plaintiff.

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*Bost*, serjeant, and *E. Lawes*, for the plaintiff.

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*Lens*, serjeant, for the defendant.

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Vide *Alanson v. Foster*, 2 T. R. 483.

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Dec. 10.

STEWART and Another v. FRY and CHAPMAN.

*A.* accepts a bill, made payable at the house of the defendants, which is indorsed to the plaintiffs, who discount it.

The bill is presented to the defendants, when due, and dishonoured.

Two days afterwards the money to take up the bill is remitted to defendants, and they are requested to follow it in

whosoever hands it may be. They tender the money to the plaintiffs, who had sent back the bill, the day before, to the drawers.

Meantime, the defendants receive an order from a house, (to which the letter inclosing the remittance referred them for advice) to hold the money to the credit of that house, as they had, by the desire of *A.* the accep-

tor, advanced him to the amount of the money then in the defendants' hands for the purpose of taking up the bill. Held, that this was a sufficient countermand of the money on the part of *A.* and that the defendants were not liable to an action for money had and received, brought by the plaintiffs, on their again getting back the bill into their possession.

**M**ONEY had and received.—The plaintiffs were the holders of a bill of 200*l.* dated 27th January, 1816, at sixty-one days, drawn by *Mathew Codd* to his own order; accepted by *Richards* and Co.; payable at the house of the defendants. This bill was indorsed by the drawer to *Belfour* and Co., and by them to the plaintiffs, who discounted it at the Bank of *England*. The bill was presented when due at the house of *Fry* and Co.; but was not taken up. In consequence of this dishonour the plaintiffs, as indorsers, paid the money to the Bank of *England*, and had the bill returned to them. They again presented it on the 8th of *April*, at *Fry* and Co.'s; but the answer was, *no effects*. The bill became due on the 7th of *April*, which, happening on a *Sunday*, entitled the Bank, who discounted it, to demand payment on *Saturday* the 6th. It was in evidence that *Richards* and Co. had sent a letter to the defendants on the 5th of *April*, from *Dublin*, in which they directed them to pay the bill accepted at their house; adding, "for which we have inclosed you funds, of the receipt of which you will please to advise Messrs. *Aspinall* and Son, of *Liverpool*. Should the bill have appeared and been refused payment for want of advice, your taking it up will greatly serve us. It will most likely be

in the hands of *W. and E. Stewart*. Any apology you make to them will greatly oblige us. P. S.—Place the amount to the account of *Aspinall and Co.*, and write for orders.” The defendants received this letter on the 9th of *April*, and immediately sent their clerk with the money to the plaintiffs. The clerk entered the money, and demanded the bill; but the plaintiffs said, they had sent it back to *Ireland* on the preceding day. On the same day, the defendants wrote to *Aspinall and Co.* at *Liverpool*, informing them what had passed. This letter was communicated by them to the acceptors, *Richards and Co.*, who were then at *Liverpool*, who requested *Aspinall and Son* to direct the defendants not to pay the bill, but to give them credit for it in account, at the house of *Aspinall and Son*. In consequence of this countermand, *Aspinall* paid *Richards and Co.* the amount of the bill, and directed the defendants to place the 200*l.* to their credit, which was accordingly done, and paid to their account. Shortly afterwards the plaintiffs got back the bill from *Ireland*, and demanded the money of the defendants, which they refused to pay, alleging the countermand.

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*Vaughan*, serjeant, for the plaintiffs, relied upon the case of *De Bernales v. Fuller*, cited in a note to *Williams v. Everett*, 14 East 590. The money in question was remitted for a special purpose, and the defendants were directed to follow the bill. They could not alter the destination of the money after the right of third parties had intervened. It is true that they tendered the money in discharge of the obligation; but that was not enough. They



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should have waited till the bill was returned to the plaintiffs. By parting with the money which had been once specially appropriated to the plaintiffs, without their consent, they became answerable in the present action for money had and received.

*Lens, serjeant, contra.*—This case is distinguishable from the case cited. In that case, the money had been expressly paid into the house of the defendant for a specific purpose; and the Court was of opinion that, inasmuch as that purpose had not been directly repudiated till afterwards, it must be taken to have been received by the defendant at the time for the use of the holder of the bill; and he could not set up any claim of his own, having received it on another account. In the present case, the defendants tendered the money upon receiving it: the plaintiffs say, they have sent the bill to *Ireland*; they do not desire the defendants to hold the money till they got back the bill; but, by their conduct, they discharge the original destination of the money. Under these circumstances *Fry* and Co. no longer held it on their account. *Richards* and Co. had a right to call upon them, through the medium of *Aspinalls*, to pay it over; and it appears they have done so. There was an interval in which the money was discharged from a specific appropriation; and the acceptors have taken advantage of it, to vary the destination.

GIBBS, C. J.—This case differs materially from *De Bernales v. Fuller*. I acquiesce in the law of that case, which I argued at the bar. When the

defendants received the remittance, they were desired to communicate with *Aspinall* and Son on the subject. Upon the receipt of the letter of the 5th of *April* they offer the money to take up the bill, and send it to the plaintiffs, expecting the bill in exchange. The answer is, that the bill is gone to *Ireland*. The plaintiffs do not apply to them to hold it till they can get back the bill. There is no undertaking on the part of the defendants to hold the money; and they were not bound, at all events, to retain it for the plaintiffs. After what had passed, they could not resist any countermand which the acceptors might send through *Aspinalls*, to whom they were referred; and *Richards* and Co., as against the defendants, had a right to alter the destination of the money. They do so, through the medium of *Aspinalls*; and it has been paid in substance to *Richards* and Co. through *Aspinalls'* account with the defendants.

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Verdict for the defendants.

*Vaughan*, serjeant, and *Chitty*, for the plaintiffs.

*Lens*, serjeant, and *Richardson*, for the defendants.

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In the ensuing term this case was moved; but the Court unanimously approved of the ruling of the Lord Chief Justice at *Nisi Prius*.

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## HART v. WHITE.

The petitioning creditor, and not the solicitor, is liable to the messenger under a commission of bankrupt, for the costs and expenses attending it. The solicitor is an agent merely, and is not to be regarded as a principal as respects the messenger; and, although he make himself responsible to the messenger, the petitioning creditor will not therefore be exonerated, without the express consent of the messenger to discharge him.

**T**HIS was an action to recover the sum of 11*l.* being the amount of a bill due to the plaintiff, who was a messenger under a commission of bankrupt against one *Samuel Jacobs*. The defence was; that the attorney alone was liable; that the plaintiff had been employed upon his credit, and never had any communication with the petitioning creditor. Mr. *Reilly*, the defendant's attorney, stated, that he was the solicitor who sued out the commission: that, in all cases in which he had employed the plaintiff, and he had employed him many years, he held himself out as solely responsible; that he considered the business in the present case as done upon his own credit, and not upon that of the petitioning creditor.

*Best*, serjeant, for the plaintiff, contended, that there was no necessity of a personal and express contract between the messenger and the petitioning creditor; that the person who sued out the commission gave authority to the acts of the messenger, and was liable by the statute 5 Geo. II. to pay him; that the work and labour done, in the intendment of the law, and, according to the fact, were done at his request, and that he alone was liable; that the solicitor was merely an agent of the petitioning creditor, and that no action could

be maintained against him in the first instance. He relied on *Hartop v. Jukes*, 2 M. and S. 438.

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*Lens*, serjeant, *contra*.—Supposing the solicitor not liable, in the first instance, to the messenger for his fees, the solicitor may make himself liable by a particular mode of dealing; and in the present case it was to be inferred that the solicitor and the messenger had acted on the personal credit of the former.

GIBBS, C. J.—Before the choice of assignees the messenger has a right to look to the petitioning creditor for payment. It is HE who puts the commission in action; and what the messenger does, is in substance to advance what the petitioning creditor has brought into operation. The plaintiff, therefore, without any express contract, is entitled to call upon the defendant. With respect to the solicitor, he is known to be an agent only, and to act for others. He is not, therefore, in the first instance responsible. He may make himself responsible if he chooses; but even his making himself responsible will not, without the consent of the messenger, discharge his right of action against the petitioning creditor.

Verdict for the plaintiff.

*Best*, serjeant, and *Campbell*, for the plaintiff.

*Lens*, serjeant, for the defendant.

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See *Hart v. Biggs*, *ante*, 252.

and the note which collects the cases.

TARN v. HEYS and Another,  
Assignees of Horrock, a  
Bankrupt. E. T. 1816.

This was an action for an attorney's bill, against the assignees of a bankrupt's estate. The plaintiff did not seek to recover for any business done before the defendants were chosen assignees, but for business arising out of the bankruptcy subsequent to their appointment. It appeared that the plaintiff had sued out the commission by the desire of the petitioning creditor. When the defendants were chosen assignees, they continued him in his situation as solicitor to the commission; and several letters were read in which they recognized him in his employment. But no original and personal retainer was proved, and no engagement had been made by the defendants to be answerable individually.

*Best*, serjeant, for the defendants, contended, 1. That they were not liable personally; they find the plaintiff solicitor to the commission, and continue him, that is to say, they do not use their authority to displace him. But

there was no personal undertaking on the part of the defendants. 2. The Act of Parliament, 5 G. II. c. 30. sec. 45. requires that the solicitor's bill should be taxed by a Master in Chancery before he is entitled to recover. 3. The defendants, acting as trustees for a body of creditors, are not in the situation of ordinary clients, and cannot be made to pay till they have funds in hand.

*Vaughan*, serjeant, *contra*, relied on *Finchett v. How*, 2 Campb. 277.

GIBBS, C. J.—The defendants find the plaintiff employed by the petitioning creditor: they continue him, and act towards him, as if they had employed him themselves. By recognizing and continuing the plaintiff as solicitor to the commission, they became personally liable. The provision in the Act of Parliament applies only to the allowance which is to be made out of the bankrupt's estate. The object of the legislature was, that the estate of the bankrupt should not be charged beyond the sum allowed by a Master in Chancery in taxing the attorney's bill. This provision was to protect the interests of the creditors on one hand, and the property of the bankrupt

on the other. But the assignees are not thereby discharged from their common law liability.

Verdict for plaintiff.

*Vaughan*, serjeant, and *Starke*, for plaintiff.

*Best*, serjeant, for the defendants.

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## CRAIG v. COX.

A. is applied to by the attorney of B. for the payment of a debt. He writes in answer "that he will wait on the defendant, when he shall be able to satisfy him respecting the misunderstanding which had occurred between them." Held, that this was no such acknowledgment of a debt, as would bar a plea of the statute of limitations; and that such evidence ought not to be left to a jury, as grounds to infer a new promise to pay.

**T**HIS was an action for goods sold and delivered. Plea *Non assumpsit* and the Statute of Limitations. The question in the case was, whether there was such an acknowledgment of the debt as took it out of the statute of limitations.

The action was brought for the balance of an account. In answer to a letter from the plaintiff's attorney demanding payment of the debt, and, in case of refusal, threatening to bring an action, the defendant wrote as follows: "Sir, as soon as I am able to attend to my concerns, I will wait on Captain *Craig*, whom I shall be able to satisfy respecting the misunderstanding which has occurred between us. I am, &c."

*Best*, serjeant, for the defendant, contended, that this was not evidence to be left to the jury of a promise to pay, or an acknowledgment of the debt. The defendant says he will adjust the misunderstanding between the plaintiff and himself: this letter is consistent with his producing a receipt for payment at the meeting.

*Shepherd*, S. G. and *Puller*, *contra*.—It is not offered as an express promise, or as an acknow-

ledgment in terms : but the letter is itself equivocal ; and very slight evidence has been deemed sufficient to take a case out of the statute. They cited a MS. case, in which the defendant, upon a similar application made to him, wrote for answer, " that he would satisfy the plaintiff, for he could shew his receipt." In which case it was held, that the defendant was bound to produce a receipt, and that it was, at all events, sufficient acknowledgment to go to a Jury, upon his failing to produce a receipt.

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GIBBS, C. J.—I think this is not sufficient to take the case out of the statute. The defendant does not put his case upon any specific grounds, which are either false, or which, when called upon, he is unable to establish ; but he simply says, there is a misunderstanding upon the subject. I agree with the decision cited. But the defendant's answer in this case amounts to nothing more than an assertion that the plaintiff has mistaken the matter.

Plaintiff nonsuited.

*Shepherd*, S. G. and *Puller*, for the plaintiff.

*Best*, serjeant, for the defendant.

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See *Truman v. Fenton*, Cowp. 548. *Lloyd v. Maund*, 2 T. R. 760. *Bryan v. Horseman*, 4 East 599.

In the case of *Bicknell v. Keppel*, 1 New Rep. 20., where the defendant wrote, that his solicitors " were in possession



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of his determination and ability," the Court held, that there was not enough in the word "ability," unexplained, to take the debt out of the statute. So, in *Collman v. Marsh*, 3 Taunt. 380., "I owe you not a farthing, for it is more than six years since," was held not to be an acknowledgment, or evidence of an admission to be left to a jury. So, a statement by a debtor

made to an executor, that the testator always promised not to press the defendant for the debt, was held not to be evidence to prove a promise to pay, made to the testator within six years. *Ward v. Hunter*, 6 Taunt. 210. In this case the Court, observing upon constructive promises to exclude the plea of the statute of limitations, said, "we have gone far enough."

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## POTHONIER and HODGSON v. DAWSON.

**T**HIS was an action of trover to recover some wine which had been deposited in the defendant's cellar. The circumstances were these: *Pothonier*, being in want of money, applied to the defendant to advance him some, and proposed to deposit 200 dozen of wine in her hands. This wine was to remain as a security for the money advanced. It was agreed that the plaintiff should be at no expence for warehouse-room, and should have the wine re-delivered upon satisfying the loan. The wine having been deposited, and bills accepted by *Pothonier* for the money advanced, the plaintiff, a few months afterwards, took in the co-plaintiff, *Hodgson*, as his partner. The wine remained in the defendant's cellars; and it appeared that the plaintiffs, in two or three instances, had sent for a portion of this wine to the defendant, and that some dozens had been delivered out to the joint order of *Pothonier* and *Hodgson*. The bills which *Pothonier* gave were not paid, and he became insolvent. Afterwards *Hodgson*, in their joint names, applied to the defendant for the wine, which she refused to deliver, and sold to reimburse herself. In consequence of this refusal and sale, the plaintiffs brought the present action. In order to prove a conversion, a witness was

1. In an action of trover against the defendant, for not delivering some wine deposited with her by way of security for an advance of money, Held, that it was not sufficient evidence of a conversion to shew, that her son, who acted as her general agent, refused to give it up; and that it was necessary to prove, that such agent acted under a special direction, in order to make the defendant liable.

2. If goods are deposited as a security for a loan of money, such deposit constitutes something more than the right of lien; and it is to be inferred that the contract between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit.

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called, who stated, that he applied to the defendant for the wine, and that she referred him to her son, who had the management of the business: he refused to deliver it up, or to pay over the proceeds.

*Vaughan*, serjeant, for the defendant, contended, that this was no evidence of a conversion by the defendant.


*Best*, serjeant, *contra*.—The acts of the defendant's agent and servant are her acts: she entrusted the management of her business to him; and she refers to him upon an application. What he says and does, under such circumstances, must bind her.

GIBBS, C. J.—It is not necessary to discuss how far the son, who is employed as a general agent and servant, may bind the mother by contracts which he makes with third parties. But his refusal to deliver the wine in question does not affect her with a conversion. It *might* be her conversion; but she cannot be made a wrong doer by this evidence. The plaintiffs, however, may shew that, in the particular fact of the refusal, he acted under her special direction.

The conversion was afterwards proved by other evidence.


*Vaughan*, serjeant, for the defendant, con-

tended, that the defendant had a right to detain the wine. It was deposited with her as a security for the separate debt of *Pothonier* at a time when *Hodgson* was no partner. She had a lien upon it, if not a property in the wine, upon the non-payment of the bills. *Pothonier*, by taking in a partner, could not communicate any right to him which he himself had not.

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*Best*, serjeant, *contra*.—Admitting the defendant had a right of lien, she has clearly been guilty of a conversion by selling the wine. The right of lien is collateral to the right of property, and does not entitle the party claiming it to sell.

*GIBBS*, C. J.—The defendant is entitled to a verdict. Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited, by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this:—"If I (the borrower) repay the money, you must re-deliver the goods; but if I fail to repay it, you may use the security I have left to repay yourself." I think, therefore, the defendant had a right to sell. There is no fraud practised upon *Hodgson*; and the delivery of a few dozen of wine to the joint order of *Pothonier* and *Hodgson* cannot be strained into a renunciation of the defendant's

1816.  property in the wine, and an admission that she held it for both.

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Verdict for the defendant.

*Best*, serjeant, and *Andrews*, for the plaintiffs.

*Vaughan*, serjeant, for defendant.

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## ASHLIN v. WHITE.

CASE for falsely misrepresenting the character of a person of the name of *Blishing*, in consequence of which plaintiff trusted him with forty quarters of corn, value 168*l*. On the 6th of *December*, 1815, *Blishing* applied to the plaintiff for the corn in question at the usual credit of one month. The plaintiff asked for a reference, and *Blishing* referred him to the defendant, who, in answer to an application from the plaintiff, said, "I know *Blishing* very well; he has bought the tide mill at *Deptford*, and given 300 guineas for it; and he is a good man." In consequence of this representation (which the declaration alleged, in the usual form, to be fraudulent and false within the knowledge of the defendant), the plaintiff delivered the forty quarters of corn to *Blishing*; but no money was ever paid, and *Blishing* absconded.

In an action on the case, for falsely representing the character of another, by reason of which false representation he obtained credit of the plaintiff; it is necessary to prove against the defendant both fraud and falsehood, viz. that the representation which he made was false, and that the defendant knew it to be false at the time he made it. Falsehood without fraud is not sufficient.

It appeared that *Blishing* had been in negotiation for the purchase of the mill; that he had obtained possession of it, and had repaired it. That he occupied it six months, and finally left it in *October* 1816; that the fact of the negotiation had been told by the agent of the owner to the defendant; and that there was a general belief in the neighbourhood that *Blishing* was the proprietor of the mill. It was likewise in evidence, that he had

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been discharged from the King's Bench about three years since.

*Best and Vaughan*, serjeants, for the defendant, contended, that the plaintiff had not proved a material allegation in the declaration, namely, the *scienter*. That the report in the neighbourhood confirmed what the defendant had said; the possession of the mill, and the repairs done by *Blishing*; were all circumstances which negatived *mala fides* on the part of the defendant. That these circumstances, taken together, were sufficient to warrant the defendant in saying that he was a good man: It was necessary to prove the representation false, and that the defendant knew it to be false; for the ground of the action was fraud and deceit. *Haycraft v. Creasy*, 2 East 92.

*Shepherd, S. G. contrà.*

GIBBS, C. J.—I am old enough to remember when this species of action came into use. It was dexterously intended to avoid the statute of frauds. By that statute no man was bound to answer for the debt of another without an undertaking in writing: but the design of this action, when first introduced into our courts of law, was to make a man responsible for having given a better character of another than such person deserved. When the principle of this action first gained ground, I remember a flood of causes followed; and much mischief and injustice would have ensued, had it not been brought back, after some struggle, within its proper legal limits. *Haycraft v. Creasy* has

marked the boundaries. It has wisely and justly established, that the foundation of this action was fraud and falsehood in the defendant, and a damage to the plaintiff by the occasion of such fraud and falsehood. Fraud and falsehood, therefore, must concur to sustain it. But there is in this case evidence which negatives fraud. The defendant had reason to believe that *Blishing's* circumstances were, in substance, such as he had represented them to be. It is a case for the Jury; but I think the defendant entitled to a verdict.

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*Shepherd, S. G. and Comyn, for the plaintiff.*

*Best and Vaughan, serjeants, for the defendant.*

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*Pasley v. Freeman*, 3 T. R. 51. But it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is. *Ib.* See likewise *Vernon v. Keys*, 12 East 632, in which case the judgment was affirmed on writ of error. 4 Taunt. 488. See likewise *Eyre v. Dunsford*, 1 East 318. *Tapp v. Lee*, 3 B. and P. 367. *Hamar v. Alexander*, 2 N. R. 241. *Hutchinson v. Bell*, 1 Taunt. 558.



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## HARMAN v. LASBREY.

*A.*, who is indebted to *B.*, gives him a bill of *C.* to get discounted. *B.*, instead of discounting it, holds the bill as a security for the debt of *A.*, contending that *A.* gave it to him by way of payment of his debt. In an action upon this bill, brought by *B.* against *C.*, *A.* is not a competent witness to prove, on the part of the defendant, that he delivered the bill to *B.* merely to get it discounted, and not as payment, without a release. Because, in the event of the plaintiff's recovering, he would be liable to the costs of the action brought against *C.*, as special damage, in an action against himself for the violation of his duty.

**T**HIS was an action on a bill of exchange for 500*l.* drawn by defendant on *Henry Spriggs*, and by him accepted, and afterwards dishonoured. The bill had been given by one *Papillon* to the plaintiff, of whom he had bought goods to the amount of 89*l.*; and it appeared that the plaintiff was to be paid for them out of this bill. The defence was, that the defendant drew the bill to accommodate *Spriggs*, and in order that money might be raised upon it for his own benefit: that, with this view, *Papillon* delivered it to the plaintiff, that he might discount it, and without any intention of paying his own debt; to which purpose he had no right to apply it. To prove this *Papillon* himself was called.

*Best*, serjeant, and *F. Pollock*, objected; that he was not a competent witness without a release; inasmuch as the question being, whether he had delivered the bill to the plaintiff to be discounted in pursuance of his authority, or in satisfaction of his own debt, (in violation of the trust reposed in him) he was coming to discharge himself; and although it might seem that he was an indifferent person, because he was liable to the goods furnished by the plaintiff to him, or to the defendant, for so much as defendant might be called on to pay to plaintiff upon the bill, he was, in reality, not indifferent;

because he was liable to the defendant, not only for the sum recovered, but for the costs of this action, which the defendant would be entitled to as special damage arising from his misapplication of the bill.

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*Lens*, serjeant, *contra*, contended, that the witness was perfectly indifferent. He was liable to the plaintiff for the goods; and if the plaintiff recovered the value of the goods against the defendant on this bill, he would be liable to the defendant for precisely the same amount, and he would not be answerable for the costs which the defendant had incurred by resisting a demand that could not be resisted with success.

GIBBS, C. J.—I think the witness cannot be examined without a release. *Papillon* bought goods of the plaintiff, and afterwards gave him this bill, out of which bill, according to the evidence, the price of those goods was to be paid. The defence is, that *Papillon* did not deliver the bill as payment, but in order that plaintiff might discount it. Now, if *Papillon* received the bill merely to get it discounted, and he pledged it for a debt of his own, I am clearly of opinion that, in a special action, he would be liable to the costs of this action, as special damage, resulting from the violation of his duty.

Verdict for plaintiff.

*Best*, serjeant, and *F. Pollock*, for plaintiff.

*Lens*, serjeant, for defendant.

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## HEDLEY v. LAPAGE.

1. *A.* undertakes to smuggle certain goods, belonging to *B.*, into *Russia*. A regular bill of lading is made out of the goods, in which the freight charged is the usual freight according to the bulk of the goods. But a second contract is made between the parties, by which *B.* undertakes to pay *A.* a larger sum of money, if the goods should be safely landed in the foreign port. The goods are landed. *B.* pays the freight under the bill of lading, and likewise part of the money under the agreement, but refuses to pay the remainder; Held, that notwithstanding the bill of lading, he was liable to pay the residue as extra freight.

2. Extra freight may be recovered under a common count for work and labour, &c.

**T**HE plaintiff sued as administratrix of her late husband, who had been captain of a merchant ship trading between *England* and *Russia*. The action was brought to recover the sum of 87*l.* 10*s.* which was claimed to be due as *extra freight* for the conveyance of some bales of woollen from *England* to *St. Petersburg*. It appeared that goods of this kind were prohibited by the Russian government; and that any foreign ship, on board of which they were found, was subject to confiscation. Regular bills of lading were made out for the goods in question; and it was admitted that the freight had been paid to the owner according to the bill of lading. But it was likewise in evidence that an agreement had been entered into between the captain and the defendant, "that, in case the bales should be safely landed and warehoused in *Russia*, the defendant would pay him the sum of 100*l.*" The goods were safely landed in *Russia*; and the defendant paid a part of the money under this agreement, but refused to pay the residue; for which this action was brought. The declaration contained counts for freight, and the common counts. The defendant had likewise expressly promised to pay.

*Vaughan*, serjeant, for the defendant.—Admit-

ting that a contract to smuggle goods into a foreign country can be sustained in an English court of justice, upon the principle that the laws of one state do not regard the revenue laws of another, the plaintiff cannot maintain this action:—1. because the stipulated freight for these goods has already been paid according to the terms of the bill of lading.—2. The plaintiff, having contracted to carry the goods for a certain sum, is precluded from recovering another sum by a *bye* bargain without a new consideration.—3. This declaration contains only counts upon an action for freight. There are no special counts for extra freight. Extra freight is an anomaly in law, and cannot be recovered but on a contract made in terms to include it.

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*Best, serjeant, contra.*—The captain has a right to stand upon his express agreement with the defendant. It may not be correct to call it a contract for extra freight; but there is a consideration for the defendant's promise in the care and trouble which the captain took to land these goods in *Russia*. There is no need of special counts. Freight may be recovered upon a count for work and labour. The defendant moreover has promised to pay.

PARK, J.—I think the plaintiff is entitled to recover, notwithstanding he has been paid the stipulated freight under the bill of lading. Extra freight may not be the correct term for the present claim; but the barely having of these goods on board subjected the ship to confiscation by the laws

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of *Russia*. The freight stipulated by the bill of lading was little more than colourable, and not meant as an indemnity for the risk. It is absurd to suppose that it was. But every objection of this kind is waved by the promise to pay. There is no need of any special counts.

*Best*, serjeant, and *Storks*, for plaintiff.

*Vaughan*, serjeant, for defendant.

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SITTINGS AFTER MICHAELMAS TERM, 57 GEO. III.  
AT GUILDHALL.

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## ZWINGER and Another v. SAMUDA.

**T**HIS was an action of trover brought to recover thirty casks of coffee. The coffee in question had been imported in the names of *Moses and Co.*, and warehoused in the *West India Docks*. At the time of importation a person of the name of *Roebuck* had an interest in them. *Roebuck* not being able to pay, the coffees were purchased by the defendant, and stood in his name in the books of the Company. On the 13th of *August*, *Roebuck*, who was a dealer in coffee, was employed by the defendant to sell them; and he negotiated a sale with *Doxat and Co.*, who were the brokers of the plaintiffs. On the 16th, *Roebuck* informed the defendant that he had sold the coffee for the sum of 534*l.*, and required to be put in possession of the Dock warrants, which the defendant delivered to him (indorsed in blank) on receiving his check for that sum, drawn upon his bankers *Hankey and Co.* On the same day *Roebuck* completed the sale with *Doxat and Co.*, the plaintiffs' brokers;

*A.* having some coffees in the *West India Docks*, employs a broker to sell them; the broker informs him that he has found a purchaser, and requires to be put in possession of the Dock warrants. *A.* delivers them to the broker, indorsed in blank, upon receiving his (the broker's) check for the price of the coffee. The broker then sells the coffee to the plaintiffs, and receives immediate payment upon handing over the Dock warrants. The broker's check, given to *A.*, is dishonoured, and *A.* immediately stops the goods in the Dock warehouse. Held, that the plaintiffs had a right to recover in trover against *A.* on the ground that the delivery of the Dock warrants by the broker to the plaintiffs, upon payment made to him, constituted a complete transfer by the custom and usage of trade; and defeated the right of stoppage in transitu.

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he handed over the Dock warrants regularly indorsed, and received payment by a check of the plaintiffs. In the mean time the defendant, who held *Roebuck's* check, was informed, upon presenting it at the banker's, that orders had been received not to pay it. In the result the check was dishonoured; and the defendant, on the next day, gave notice to the Dock Company to stop the goods. The question was, whether the defendant had a right to stop, after the indorsement and delivery of the Dock warrants to the plaintiffs upon payment for the goods.

*Vaughan*, serjeant, for the defendant, contended,  
1. It was clear that the original vendor, the defendant, through whom title was derived to the plaintiffs, had been defrauded; and the question was, whether the delivery of the Dock warrants, under the circumstances of the case, passed a title to the property not subject to a countermand. He contended that a Dock warrant was not a negotiable instrument, like a bill of exchange, or bill of lading. That those instruments were assignable, and conveyed property by the custom of merchants; but a Dock warrant had no such character. It was merely an authority to the Dock Company to deliver, and countermandable like a common order for delivery. The question was of the greatest magnitude. Did the mere transfer of an instrument, not known till within these few years in commerce, although admitted to be for a valuable consideration between third parties, defeat the right of the unpaid vendor to stop the goods? 2. The plaintiffs had been guilty of laches; and had taken the

warrants from the person who delivered them without enquiry. It was not sufficient to have the warrants handed over ; they should have applied to the Dock Company to know if there was any stop upon the goods.

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Several brokers were called on both sides, who stated, that it was a very common case for these warrants to pass from one hand to another ; and they were considered to convey the property by delivery without application to the Dock Company. That sometimes application was made to the Dock Company before payment, the vendees not being satisfied with the bare indorsement of the warrants. But that such practice was not frequent.

*The Solicitor General, contra.*—These instruments are received in commerce as the symbols of property ; they circulate from hand to hand by indorsement ; and it would be a great impediment to merchants, if no property passed under them without a previous application to the Dock Company. The defendant indorsed these warrants in blank, and thus sanctioned the transfer of the property to any person who purchased for a good consideration. It is no reason why the plaintiffs should sustain a loss, because the defendant had inadvertently trusted Mr. Roebuck.

PARK, J.—I think these instruments are made negotiable by the custom of the trade. They are symbols of property ; and the merchant, who purchases them for a good consideration, derives a title



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from the indorsement and delivery. They resemble a bill of lading. The plaintiffs took the warrants in the usual course of dealing ; and I do not think that, in order to perfect their title, they were required to make an application to the Dock Company.

Verdict for the plaintiffs.

*Shepherd, S. G. and Lens, serjeant, and Richardson, for plaintiffs.*

*Vaughan and Onslow, serjeants, and F. Pollock, for defendant.*

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This case was discussed in Court in the ensuing term, upon a motion for a new trial ; but, after granting a rule *nisi*, the Court, when the case came on to be argued, discharged the rule ; upholding the opi-

nion expressed by the learned judge at Nisi Prius, that these Dock warrants, indorsed, *bonté fide*, and for good considerations, transferred the property in the goods, like a bill of lading, &c.

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## DUNN v. SLEE.

**T**HIS was an action of contribution brought by one surety against a co-surety, to recover an *aliquot* share of a sum of money which he had been obliged to pay, in consequence of his having entered into a bond jointly with the defendant and others, to indemnify *Brown* and Co, who were bankers at *Brighton*, against any loss which they might sustain in certain transactions with a Mr. *John Slee*, the defendant's brother. The case was this: *John Slee* had become indebted to *Brown* and Co. who called upon him for some security. *John Slee* proposed a bond to be executed by himself and three sureties, jointly, and severally. The sureties were, *Josiah Slee*, the present defendant, *Atkins*, and *Dunn*. The bond was for 3,000*l.*, the conditions were for a general indemnity, and it was provided that three months' notice should be given to the parties before the bond was to be put in suit. The bond bore date *January* 1809. *Brown* and Co., trusting to this bond, dealt for some time with *John Slee*; but, becoming suspicious of *Slee's* solvency, they gave notice to *Dunn*, one of the sureties, and called upon him to pay 3,000*l.* which was then due to them from *Slee*. This application was made in the latter end of the year 1814. *Dunn*, not being able to pay at the time, gave a

1 A bond is given to *A. B.* and *C.* by the plaintiff and defendant, who were sureties for *D.* The plaintiff is obliged to pay the bond, and brings an action against his co-surety for contribution. A defence is set up, that the principal had paid money, specifically on account of this bond, to one of the obligees, and that such obligee had carried it to the account of the bond. Held, that any declaration of the obligee, upon what account he received the money, or how he had applied it, (unless such declaration were made at the time of payment,) was not evidence; and that such obligee must be called as a witness.

2. Though time given to the principal will, under certain circumstances, exonerate a surety; yet, time given to a surety, without the privity of his co-surety, will not, upon his paying the debt, affect his right of action for contribution against such co-surety.

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warrant of attorney to *Brown* and Co. bearing date 1st *January* 1815, to secure the 3,000*l.* which warrant of attorney contained a defeasance to be void, provided the money should be paid on or before the 1st of *June* 1816; otherwise judgment to be entered up, and execution issue. It appeared that *Dunn* entered into this arrangement with *Brown* and Co. without the privity of the defendant. *John Slee* and *Atkins*, the other surety, had since become bankrupts.

On the part of the defendant there were two points:—1st, That *John Slee* had paid the 3,000*l.* specifically to *Brown* and Co. in discharge of the bond; and, therefore, that the payment made by *Dunn*, which was two years after, could not render the defendant liable to repay him.—2d, That the defendant was discharged in law, the principals, *Brown* and Co., having given time to *Dunn*; and *Dunn* having made a new arrangement with them, without the privity of his co-sureties.

To prove the first point *John Slee* was called as a witness: he stated that *Brown* and Co. had applied to him in 1812, to pay the 3,000*l.* on the bond; that he accordingly paid it by instalments of 1,000*l.* each into the hands of their *London* bankers; the last payment being made in *September*, 1812. He was then asked by the defendant's counsel, whether, after the payment of the several instalments, *West*, one of the junior partners, had not admitted that they had received the 3,000*l.* on the specific account of the bond. This question

was objected to by the plaintiff's counsel, who insisted that *West* should be called.

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*Lens* and *Pell*, serjeants for the defendant, contended, that the evidence was strictly admissible, and that it was not necessary to call *West*. That the declarations of a person, not a witness, were often admitted in evidence, in cases in which he was no party upon the record. That the material question in the case was, had *Brown* and Co. been paid the specific 3,000*l.* on the bond? Surely, their admission that they had been paid in a particular manner was evidence in a cause which turns upon that point solely. In an action on the bond it would have been good evidence against *Brown* and Co. and why is it not good evidence in an action like the present, which is in substance upon the bond itself.

*Shepherd*, S. G. *contra*.—*West* may be called. The written entries of a witness, who is dead, may be read in evidence; the reason is, because he is dead. But *West* is a competent witness, and may be examined.

*PARKE*, J.—I am of opinion that the declaration of *West* is not evidence in the cause. What *West* said at the time of payment, or at the time when payment was demanded of *John Slee*, was a fact that might be proved; it would be a part of the *res gestæ*; but any declaration made, after payment, upon what account he received the money, is no evidence against the plaintiff. He must be called; his unsworn declaration cannot bind any interest

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of the plaintiff, who has a right to his oath, and to cross-examine him. I therefore reject the evidence.

Other evidence was given, the tendency of which was to shew, that the 3,000*l.* had not been paid or received on account of the bond.

*Lens*, serjeant, then objected, that the plaintiff could not recover in point of law. *Brown* and Co. had given time to one surety, the present plaintiff, who had entered into an arrangement with them, without acquainting his co-surety, the defendant. That the defendant was thereby discharged. A new security was taken from *Dunn* in his own name, giving him time for eighteen months. This, therefore, was a discharge to the defendant, unless *Brown* and Co., or the plaintiff, could shew his express consent.

*Shepherd*, S. G. *contra*.—This is a case of time given to a surety, and not of time given to a principal. An obligee undoubtedly cannot give time to a principal, without the privity of the surety; but he may give time to one surety without the consent of the other, and hold them both liable.

PARK, J.—This case does not fall within the general rule. Undoubtedly, as between principal and surety, time given to the former, without the consent of the surety, will, under certain circumstances, discharge the surety. This rule, which now obtains in courts of law, was originally borrowed from courts of equity; and it is not technical, but founded in essential justice. We proceed, by the same analogies, in our mercantile law upon bills

of exchange. Time given to the acceptor will discharge the drawer. But I am not aware that it applies between co-sureties. Each surety is liable, jointly and severally, on this bond. One surety cannot be injured by time having been given to another. *Brown* and Co. might have recovered the whole amount from any one of the sureties; and the surety who paid the whole would still have his action of contribution against a co-surety, notwithstanding any arrangement for time which might previously have taken place between the obligee and such surety. I think this is no answer.

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 DEAN  
 &  
 SHERMAN

Verdict for 891*l.* 10*s.*

*Solicitor General, Hullock, serjeant, and Ross,*  
 for plaintiff.

*Lens and Pell, serjeants, and Richardson, for*  
 the defendant.

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In the ensuing term, the defendant's counsel applied for a rule to shew cause why there should not be a new trial. The Court, upon hearing the case, refused the rule, thereby confirming the opinion given by the learned judge at *Nisi Prius*.

Equity will not charge a surety further than he is bound at law. *Ratcliffe v. Graves*, 1 Vern. 196. *Sheffield v. Lord*

*Castleton*, 2 Vern. 393. Therefore any act discharging the principal at law, discharges the surety, unless the surety be implicated in fraud in bringing about such discharge to the prejudice of the rights of the obligee.

The reason forming the ground of discharge, is an act of time being so given to the principal, that the obligee has

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*undertaken* not to sue the principal in the mean time, even at the request of the surety. *Rees v. Barrington*, 2 Vez. Jun. 540. Dict. in *Wright v. Simpson*, 6 Vez. 734. But the mere change, or addition, of securities, not displacing the original debts, nor tying up for a time the creditor's right of action, will not discharge the surety. *Boulbee v. Stubbs*, 18 Vez. 20.

Composition with the principal, reserving the remedy for the remainder against the surety, has been recognized in courts of law and equity; though it is considered as involving the absurdity of rendering the principal, by circuity of action, liable to the whole. *Boulbee v. Stubbs*, 18 Vez. 20. But the utility of

making a judicious arrangement for the benefit of creditor and surety, may be easily perceived; and there is no derogation from the due protection of the surety, by suing him only for a part of that whole, which might have been demanded from him; leaving his remedy against his principal for such part unprejudiced. Perhaps a creditor, compounding with his principal, and delaying the demand of the debt against the surety, and in the mean time the principal becoming insolvent, might be a case for equity to interpose, in order to protect the surety against the creditor upon the ground of fraud: but it is apprehended that this is an undecided case. See *Orme v. Young*, ante, p. 84.

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OSEY and Another v. GARDNER and Another.

**T**ROVER to recover 150 puncheons of rum. The defendants being possessed of the rum in question, which was at the time in the *West India Docks*, sold it to a person of the name of *Meredith*, who gave directions to ship it on board the *Zealous*, which he had chartered on a voyage from *London* to *Rotterdam*. Having obtained a bill of lading from the captain, previous to the loading of the goods, *Meredith* indorsed it over to the plaintiffs, who gave him their check for 4,000*l.* on *Jones, Lloyd and Co.* in payment for the rums. This check was duly honoured; but the defendants not being paid, and having a suspicion of the solvency of *Meredith*, countermanded a part of the goods, which were, at the time of countermand, in the course of delivery from the *West India Docks*, and seized the rest, forcibly, from the vessel on board of which they had been shipped.

One hundred and three puncheons were on board when the defendants stopt them; forty-seven were still undelivered. The transaction between *Meredith*, and *Osey and Co.*, on their part, was not liable to impeachment.

The bill of lading bore date on the 28th *November* 1815, which was before any of the goods were on board the *Zealous*.

*A.* has some rum in the *West India Docks*, which he sells to *B.* The rum is to be shipped by *A.* in a vessel chartered by *B.* Before the rum is delivered on board the vessel, *B.* gets a bill of lading from the captain; he then sells the rum in question to *C.*, who pays *B.* for it, upon an indorsement of the bill of lading. *A.* being unpaid, and suspecting the solvency of *B.* takes some part of the rum forcibly from out of the vessel, and countermands the delivery of the rest. In trover by *C.* against *A.* to recover the rum: Held, that *C.* gained no good title under the bill of lading; such bill being fraudulent, inasmuch as *B.* procured it to be signed by the captain before the rum was delivered on board the ship.



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*Shepherd*, S. G. for the defendants, contended, that they had a right to stop the rum *in transitu*. It was true, the plaintiffs had paid a good consideration for the rum; but they could only take such title to the goods as *Meredith* possessed. The captain had signed a bill of lading before the goods were on board. At the time it bore date they were actually in the *West India Docks*. He had moreover signed a bill of lading to persons who were not the real shippers. The defendants were the shippers; they had shipped a part, and had countermanded the remainder. It would be the source of infinite fraud, if a bill of lading could be construed to convey an assignable property, before the goods were actually laden on board the vessel. The bill of lading purported that the goods, at the time of delivering it, *were on board*. If they were not on board at *that* time, it was an instrument pregnant with fraud.

*Best*, serjeant, *contra*.—The plaintiffs knew nothing of the circumstances under which this bill of lading was signed. It was exhibited to them, and they paid 4,000*l.* for the property. The bill of lading transfers the property, whether the goods are on board or not; if the assignee, at the time he takes it, is ignorant that the goods are not on board. No attempt is made to impeach the honesty of the transaction on the part of the plaintiffs. The ship was chartered to *Meredith*. The moment the goods were put on board the delivery to *Meredith* was perfected, and the sale to the plaintiffs attached.

BURROUGH, J.—Under the circumstances of the case, I think the bill of lading transferred no property to the plaintiffs. Can a bill of lading be considered to be made *bonâ fide*, when no goods are on board at the time that the captain signs it? Is not such an instrument fraudulent?

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Upon some of the Jury expressing an opinion that they thought the bill of lading fraudulent upon that ground, the plaintiffs consented to be nonsuited.

*Best*, serjeant, and *F. Pollock*, for the plaintiffs.

*Shepherd*, S. G. *Vaughan*, serjeant, and *Marryatt*, for the defendants.

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Vide *Craven v. Ryder*, ante, and *Withers v. Lys*, p. 18. See p. 100.: and 6 Taunt. 433.: likewise the notes to the cases.

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ARBOUIN and Another, Assignees of GOWEN, a  
Bankrupt, v. TRITTON and Others.

*A.* before his bankruptcy, discounts certain bills of exchange with *B.* and Co. his bankers. They give him immediate credit for the value of the bills in his account, minus the discount. A balance is likewise struck, before the bankruptcy, and, whilst the bills were yet running, in favour of *A.*, when the bankers admit that they have in their hands 934*l.* 8*s.* 8*d.* due to *A.*, giving him credit for the bills then running. *A.* becomes a bankrupt, and the bills are dishonoured. Held, that in an action against the bankers for the balance admitted to be due to *A.* before his bankruptcy, they have a right to set off against such claim, the amount of the dishonoured bills, it being a case of mutual credit, under the 5th Geo. II. c. 30. s. 28.

**M**ONEY had and received.—The defendants pleaded the general issue. This action was brought to recover the sum of 934*l.* 8*s.* 8*d.* being the balance of an account in the hands of the defendants, who had been bankers to a person of the name of *Gowen*. In May 1816, *Gowen* procured the defendants to discount him two bills of exchange; one for 1,000*l.* at two months, drawn by himself, and accepted by one *Arnold*; the other, for 312*l.* 17*s.*, drawn in the same manner, and accepted by one *Mills*. Both bills were discounted in cash by the defendants, and *Gowen* had credit for them in his account with the house, minus the discount. This transaction was in May. On the 18th of June, the defendants made up *Gowen*'s account, which was then balanced; when, giving him credit for the proceeds of the discounted bills (then running) the sum of 934*l.* 8*s.* 8*d.* stood as a balance in his favour. This sum was now sought to be recovered by the present action. On the 17th of June, *Gowen* committed an act of bankruptcy, and a commission issued on the 20th. On the 15th of July the present action was commenced: on the 19th, the bill for 1,000*l.* became due; and, on the 12th of August, the second bill for 312*l.* 17*s.* Both acceptors were insolvent, and the bills remained in the hands of the defendants.

it being a case of mutual credit, under the 5th Geo. II. c. 30. s. 28.

It was in evidence, that a clerk of the defendants called upon *Gowen*, on the 17th of *June*, to tell him of the apprehended insolvency of the acceptors of both bills, and to require that the bills should be taken up; or security given. *Gowen* informed him that he was not in a condition to take them up.

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*Lens*, serjeant, for the plaintiffs, contended, that the bills being actually discounted, and not, as was sometimes usual with bankers, deposited, with liberty for the customers to draw, the plaintiffs were entitled to recover. The defendants had themselves balanced the account on the 18th of *June*, and admitted the sum in dispute to be in their hands. *Gowen's* bankruptcy had put them in the same situation as his other creditors. They must prove the bills under his estate, and account with the assignees for the funds which belonged to *Gowen* at the time of the bankruptcy.

*Shepherd*, S. G. *contra*, relied upon the statute 5 Geo. II. c. 30. s. 28.—This was a case of set-off; or, more properly, of mutual credit. *Gowen* indorsed the bills to defendants, who advanced him money upon them. They had a demand against him, and they had given him a credit upon these securities. This was that condition of the parties to which the statute was meant to apply. It was true the day of payment had not arrived; but the day of credit was passed. The mutual credit arose at the time the bankers credited *Gowen* on the securities, and when he (*Gowen*) trusted the bankers with the proceeds.

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DALLAS, Justice.—I am of opinion that the plaintiffs are not entitled to recover. I rely upon *Olive v. Smith*, 5 Taunton 56. It has been holden that mutual credit in this act of Parliament is a term more extensive than mutual debts. It has been applied to cases where parties have been trusting each other at the time of the bankruptcy, and has never been narrowed to pecuniary demands which were liquidated at the time. The defendants, therefore, have a right to retain this money against the dishonoured bills.

The plaintiffs were nonsuited.

*Lens and Copley*, serjeants, and *Reader*, for the plaintiffs.

*Shepherd*, S. G. and *Campbell*, for the defendants.

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The case of *Olive v. Smith* determined this: that where a person, entrusted with value, trusts his creditor with that which may become productive of value, the first becoming bankrupt, the second may retain his debt out of the proceeds of the thing entrusted to him, and only pay the balance.

The statute of 5 Geo. II. c. 30. s. 28. relates not only to mutual debts, but to mutual

credits; and the term, of itself extensive, has been enlarged by a most liberal construction, not only in courts of law but in courts of equity. It has been extended, indeed, by the authority of the Lord Chancellor sitting in bankruptcy, to cases where an action would not lie at common law, and where the Court of Chancery would not, upon a bill, decree an account. *Ex parte Deeze*,

1 Atk. 228. *French v. Fenn*, Co. Bkt. Laws, 554. *Atkinson v. Elliott*, 7 T. R. 378.

But no debt or credit can be set against each other, unless it accrued before the bankruptcy. Ex parte *Boyle*, Co. Bkt. Laws 561; and mutual credit may be constituted, though the parties did not mean to trust each other. *Hankey v. Smith*, 3 T. R. 507. So, it has been held, that this statute

is not to be confined to dealings in trade only, or in case of mutual running accounts, but it is natural justice and equity, that in all cases of mutual credit the balance only shall be paid. *Lanesborough v. Jones*, 1 P. Wms. 325. See likewise, *Whitehead v. Vaughan*, Co. Bkt. Laws, 566. And see Ex parte *Stephens*, 11 Vesey 24; and *Parker v. Carter*, Co. Bkt. Laws 567.

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LEVI and Others, Executors of Angelo Levi,  
v. BARNES.

An insurance broker is not entitled, upon the ground of any usage of trade, to a commission of 12 *per cent.* on the balances which he pays over to the underwriters who employ him. Such allowance, however general it has been, is a *gratuity* merely, and not a demand of right. Nor can it be claimed, but upon the footing of contract, either express or implied, between the parties.

THIS was an action brought for the balance of an account claimed to be due to the estate of the deceased. Money had been paid into Court, and the sum sought to be recovered was 54*l.* *Angelo Levi*, the testator, had been an underwriter, and the defendant was employed as his broker. The main question in the case was, whether a broker was entitled to an allowance of 12 *per cent.* on settling an account with the underwriter, over and above his customary commission of 5 *per cent.* The plaintiffs contended, that this charge of 12 *per cent.* was a mere gratuity, and no legal right. The defendant claimed to deduct it, 1st, upon the usage of trade; 2d, upon an implied contract in the particular case, to be inferred from the habit of dealing between the parties. On the part of the plaintiffs several witnesses were called. They stated, that the 12 *per cent.* claimed was considered as a gratuity merely; that the allowance to the broker was formerly 10 *per cent.*, and, within late years, had been augmented to 12. That it was allowed as an inducement to the broker to bring the underwriter good risks. That it was never paid in cases of bankruptcy. That it was sometimes, but not invariably, allowed in case of the death of the underwriter. That, where there was a difference between the broker and the underwri-

ter, no allowance whatever was made. An underwriter, in great business, stated that he received 22,000*l.* on policies in one year without making any allowance to the broker beyond his commission. The commission of 5 *per cent.* was due upon the gross premiums, and for whatever money the broker advanced for stamps, &c. on the policies which he procured, he was entitled to charge 5 *per cent.* additional.

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On the part of the defendant several brokers were likewise called. One broker stated, that he had settled 200 policies, and had the commission of 12 *per cent.* always allowed. He stated the allowance (with the above mentioned excepted cases) to be universal; and that, without such compensation, no broker could carry on his business. There was likewise evidence that in accounts between *Levi* and *Barnes* in the lifetime of the former, the 12 *per cent.* had been invariably claimed and allowed.

*Shepherd*, S. G. for the defendant contended; 1st, That this is a usage of trade incorporated in the contract, and the demand is reasonable. The broker becomes responsible to the underwriter for the premium, and he is liable to an action for it, whether he receives it or not from the assured. The *per centage* claimed is not on the gross business done, but upon the clear profits received by the underwriter. The broker gets nothing unless he hand over a balance to the underwriter; the trouble, therefore, is certain; the compensation contingent. 2d, From the course and habit of



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dealing between the parties a contract may be inferred.

*Lens*, serjeant, *contra*.—This commission has never been demanded as a legal obligation but always as a gratuity. Though *Levi* and *Barnes* settled accounts on this footing, it does not appear that the money was paid on any other consideration than as a gratuity. It has sometimes been paid ; sometimes refused ; and there is no evidence of its having been paid, when litigated. It is too variable to be called a usage, and there is no ground to infer a contract.

DALLAS, J.—I think there is no evidence of an usage of trade. The essence of usage is uniformity ; but, in the present case, different allowances have been made at different times, and the demand is subject to exceptions arising out of circumstances. Now, if it were due of right, such circumstances would not prevail to exclude it. If it were demanded upon the usage of trade, surely an allowance of this magnitude, when refused by an underwriter, would have been compelled in a court of justice. But there is no case in which, when refused, it has been enforced as other rights are. I shall leave the evidence to the jury ; but it appears to me that there is nothing amounting to legal usage on the subject. It comes to no more than a gratuity given by the underwriter as an inducement to the broker to bring good policies to him. With respect to the second question it is for the jury to say, whatever might be the nature of the claim, whether there was an implied contract

between the parties to allow it on the settlement of accounts.

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The jury (which was a special jury of merchants) found a verdict for the plaintiffs, and stated that it was their unanimous opinion that the allowance was a gratuity merely.

*Lens*, serjeant, and *Munroe*, for the plaintiffs.

*Shepherd*, S. G. and *Best*, serjeant, for the defendant.

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## BENSON v. SCHNEIDER and Others.

*A.* charters a vessel, and covenants to supply a full and sufficient cargo of certain commodities (describing them) and, amongst others, of cotton; the freight of which was to be paid for, at certain prices, per lb. for round bales, and different prices for square or compressed bales. He furnishes a cargo of compressed bales of cotton, but neglects to have the cotton re-compressed, according to the usage of the trade, and the custom of the country, whence it was imported. In consequence of this omission the vessel has not a full and sufficient cargo, as estimated upon the bales if they had been re-compressed, though her cargo would have been full and sufficient, if the cotton had been stowed only in a compressed state. Held, that *A.* was liable for dead freight, and that it was his duty to have furnished the cotton in re-compressed bales, notwithstanding the words of the charter-party.

**T**HIS was an action on a charter party, dated *London, January 15, 1816.* The ship's name was *The Canada*, and the voyage was from *London to Charlestown, or New Orleans*, and from thence back again to any part of the United Kingdoms. The declaration alleged two breaches:—  
1st, That the defendants did not supply the ship with a full and sufficient freight. 2d, Non-payment of a part of the freight. The defendants took issue on these breaches. The defendants undertook by the charter-party to supply the ship with a full and sufficient cargo of wool, rice, or other goods. The freight to be paid for cotton wools, in round bales,  $2\frac{1}{2}$  per lb.; for cotton wools, in square or compressed bales,  $2\frac{1}{4}$  per lb. net; and rice 7*l.* per ton net, as far as 150 tons. In case of not finding a cargo at *Charlestown* the ship was to be at liberty to go to *New Orleans*. The plaintiff's counsel contended, that, though the defendants furnished compressed bales of wool, that it was their duty to have had the bales *recompressed*, for the purpose of stowage, and that they should have supplied a sufficient quantity of compressed bales, which, when recompressed, would have been a full cargo. The deficiency upon a survey was 129

bales of recompressed wool, for the dead freight of which the action was brought. A hundred bales in a compressed state were put on board whilst the captain was ill; and it was admitted that, if the bales were only to be compressed, the vessel had a full and sufficient cargo.

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It was in evidence that the custom at *New Orleans* was, when cotton was furnished in compressed bales, to send it to be recompressed; the owner of the cotton paying the carriage of the wool to the machine; and the recompressing was at the expence of the shippers. The recompressing does not injure the cotton: but there is a difference of opinion about it. The custom invariably was to recompress the bales, except the freight is small; or when the ship is not required to take a full cargo. A round bale is not called a compressed bale; but a compressed bale is a square bale, put in bags, and only slightly pressed by a sort of capstan. The compression and recompression are both the same process, but with different degrees of mechanical power. The compression takes place up the country, where the cotton grows. The object of recompressing was to make it fit for stowage.

*Lens* and *Vaughan*, serjeants for defendants, contended, that the question is, whether, when the parties use known terms in the trade, and define what is meant by express words, any usage can be adduced to shew that they intended another thing. They covenant to pay for cotton wool in round bales, or in square compressed bales. The defendants, it is admitted, have furnished a full and

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sufficient cargo, if the cotton had been loaded in the round or compressed state. Undoubtedly, by machinery the ship might have been made to hold more ; but the question is, have not the defendants supplied sufficient within the terms of the charter-party. The parties have described the measure of the freight. There are three known classes of cotton bales :—1st, the round bale ; 2d, the square or compressed bale ; and, 3d, the re-compressed bale. If the parties had meant re-compressed bales, they would have used that term. This case does not turn upon usage, but upon the intention of the parties.

**BURROUGH, J.**—It appears to me that the substance of the contract is, that the ship is to have a full and complete cargo of cotton wool, rice, or whatever other goods might be offered. What follows afterwards in the charter-party, as to the description of the form of the bales, is not of the substance of the contract. It regulates the price merely. If the parties were at liberty to put commodities in a bulky state on board, the owner would not have a full and complete cargo, and might be disappointed of the fair fruits of the voyage. I think the substance of the contract is the full loading. The particular kinds only regulate the price.

Verdict for the plaintiff.

*Shepherd, S. G. Hullock and Campbell, for plaintiff.*

*Lens and Vaughan*, serjeants, and *F. Pollock*,  
for defendants.

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This case was moved in the ensuing term; but the opinion of the learned judge, as expressed at the trial, was unanimously adopted by the Court, and the rule *nisi* for a new trial, which had been obtained, was discharged.

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## BUREAU HARPER.

Although comparison of hand-writing is not admissible evidence, when the fact to be proved is the hand-writing of a particular person, whose supposed signature is upon a paper put into the witness's hand, yet, if such witness has a document, to which is affixed the hand-writing of that person, (as to whose signature the question arises) and which document he knows to have his genuine subscription, he has a right to recur to it for the purpose of refreshing his memory; a basis being first laid in his having once seen the defendant sign his name, though he had forgotten the character of his hand writing.

**A**CTION on a special contract in writing. The question arose upon the evidence to the hand-writing of the defendant. A witness was called by the plaintiff's counsel to prove the signature of *Harper* to the agreement. He stated that he once saw him sign his name to a paper which he then had in his possession; that the fact made so slight an impression upon his mind, that, judging from that single occurrence, he was not able to say whether the hand-writing to the agreement was the defendant's or not; that he would not venture, from the mere inspection of the paper, to form a belief on the subject; but that, by comparing the signature of the agreement, to which he was required to speak, with that which was subscribed to the paper then in his possession, he was able to swear that he believed it to be the defendant's writing.

*Best* and *Pell*, serjeants, objected, that this evidence could not be received. The witness's testimony amounted to nothing more than an opinion formed upon a comparison of hand-writing. He did not profess to have any independent knowledge of the character of the defendant's signature. He had seen him sign his name once, and it had made no impression upon him. He had formed no standard in his mind which he could undertake

to apply as a test to the signature of the particular paper. Now it was an established rule in evidence, that hand-writing could not be proved by comparing the paper in dispute with any other paper, although such paper was acknowledged to be genuine.

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*Shepherd, S. G. contra.*—The evidence offered is not a simple comparison of hand-writing. The witness has recourse to the paper to refresh his memory upon the subject. It was evidence to be left to the Jury.

DALLAS, J.—How far the comparison of hand-writing may be admitted in evidence was much discussed in the case of *The King v. Cator*. The present case, however, turns upon a different point. It is a case of great novelty and difficulty; but, being required to form an opinion upon the subject, I shall admit it as evidence to be left to the Jury. Comparison of hand-writing has been rejected upon two grounds. 1. That, unless a Jury could read, they would be unable to judge of the supposed resemblance. 2. That specimens may be unfairly selected, calculated to serve the purpose of the party producing them; and, therefore, not exhibiting a fair example of the general character of the hand-writing. These are the grounds alleged for rejecting such comparisons. But the present evidence cannot, in strictness, be called a comparison of hand-writing. What are the materials of judgment to which a witness has recourse when he says that he believes a particular signature to be the hand-writing of a particular



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person? He has seen the person write, and he is presumed to have formed a standard in his mind; and, with that standard, to compare the writing in question. This standard will be more or less perfect, according as the instances have been more or less frequent. The mere fact of having seen a man *once* write his name may have made a very faint impression upon the witness's mind. But some impression, however slight in degree, it will make; and surely, as the standard exists, and the witness possesses the genuine paper, he may recur to it, to revive his memory upon the subject. Here, a basis is laid in the fact of his having seen the defendant sign his name *once*. But his memory is defective. He then recurs to a paper which he knows to be an authentic writing. He uses it to retouch and strengthen his recollection, and not merely for the purpose of comparison. I think, therefore, the evidence is admissible.

The writing being admitted, the defendant's counsel called witnesses to prove that it was not the genuine signature of the defendant; and the Jury, upon that point alone, found a verdict for the defendant.

*Shepherd, S. G. and Campbell, for the plaintiff.*

*Best and Pell, serjeants, for the defendant.*

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*Rex v. Cator, 4 Esp. 117. Le Blanc J. Morewood v. 145. Brune v. Rawlins, 7 Wood, 14 East 328. Revet East, 282. n. (a) as ruled by v. Braham, 4 T. R. 497.*

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## BELL and Others v. NIXON.

**T**HIS was an action on a policy of insurance, bearing date the 17th of *April*, 1816, on the ship *Dorset*, from *Hull* to *Quebec*. The plaintiffs claimed a total loss. She sailed on the 27th *April*, 1816. She stood in *Lloyd's* book, No. 21, at the time she was insured; but before she sailed, she had been reduced a number, in consequence of a survey made previous to the voyage. The policy was valued at 3,500*l.* The freight of the ship was 2,500*l.*, but was not insured. The ship sailed on her voyage; and, being overtaken by bad weather, ran into *Limerick*. *Limerick* has no docks to take in ships of any size. The ship, upon survey, appeared to be considerably damaged. The agents of the plaintiffs conceived it impossible to remove her to any port for the purpose of repair; nor could she be repaired at *Limerick*. She was therefore surveyed, condemned, and broken up; which was judged to be the best proceeding for all the parties concerned. The *Dorset* was a *Danish* prize, and there was no record of her age. She was strictly surveyed; and, when broke up, some of the timbers were found to be rotten; but it was in evidence that she was sea-worthy when she left *Hull*.

A vessel is driven into a port, where there is no dock to receive her: it appeared that she had suffered so much by sea perils, that, upon examination and survey, it was judged expedient to break her up, and to sell her for old timber. Held, in an action on the policy, that the assured was bound to abandon before he could call upon the underwriters for a total loss; the ship not being a wreck, but, however maimed and damaged, existing in specie as a ship.

*Shepherd*, S. G. and *Vaughan*, serjeant, for the

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defendant, contended, that the assured were bound to abandon ; the ship existing in *specie*. Although there was no dock at *Limerick*, that circumstance could make no difference. They have sold the vessel without giving notice of abandonment. They cited *Martin v. Crockatt*, 14 East 465.

*Best and Copley, serjeants contrà.*—The principle is this ; if the ship exist as a ship, there must be an abandonment ; but in the present case no abandonment was necessary. The ship did not exist as a ship. She did not subsist as the same sort of thing which she did previous to the voyage. This is not a case of the mere suspension of the voyage. The ship was destroyed. The only necessity of abandonment is where the ship remains capable of performing the functions of a ship ; and where the voyage is merely interrupted by the perils of the sea. In this case the ship was in effect destroyed. She was entirely and perpetually gone. Abandonment cannot alter the relative rights of the parties. Abandonment is not necessary in the case of a wreck. The loss here was, in substance, a wreck.

DALLAS, J.—I shall not nonsuit the plaintiffs on this objection. The assured has a right to abandon under certain circumstances ; and, in some cases, he may claim a total loss without abandonment. But, if the case be doubtful, the assured ought not to take upon himself to determine for the underwriters ; to break up the ship ; and to call upon them for a total loss. I think that he

should, in this instance, have communicated to the underwriter the state of the vessel. The ship is proved to have been in that condition that it was necessary to have a survey. Examination and judgment were therefore applied to determine what it was expedient to do. The arguments by which this ship is represented to be a wreck proceed upon a fallacy. She was not a wreck. Her timbers were together; she existed as a ship specifically, both when she was surveyed, and when she was sold; and it is not because there was no dock at *Limerick* to receive her, and because she is found to contain rotten timber upon breaking up, that she is to be represented as a wreck. If her planks and apparel had been scattered in the sea it would have been another question. I will not nonsuit; but I have a very strong opinion against the plaintiffs.

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The case then proceeded on the question of sea-worthiness upon which nothing material arose; but the plaintiffs ultimately had a verdict upon two points:—1. That a notice of abandonment had been given to the underwriters, of which fact the plaintiffs gave some slight evidence. 2. That the vessel was not unseaworthy.

*Best*, and *Copley*, serjeants, and *Campbell*, for the plaintiffs.

*Shepherd*, S. G. *Vaughan*, serjeant, and *Spankie*, for the defendant.

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In the next term this case was moved; and the Court was unanimously of opinion that an abandonment was necessary. See *Gernon v. The Royal Exchange As-*

*urance Company, ante, 49.* and the note, p. 53. in which the cases of abandonment are collected, and commented upon.

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## KEMBLE and Others v. ATKINS and Another.

**T**HIS was a special action of assumpsit brought against the defendants for not accepting a quantity of sugar, which the plaintiffs, as brokers, had purchased for the defendants.

The declaration stated the contract in several ways: 1st, That, in consideration that the plaintiffs, as agents and brokers for the defendants, would purchase the sugars, the defendants undertook to receive and pay for the same.

2d, That, in consideration of the purchase, the defendants undertook and promised the plaintiffs, as their brokers and agents, to pay for the same.

3d, That, in consideration that the plaintiffs, at the request of the defendants, would purchase fifty-seven hogsheads of sugar, at and for a reasonable price, &c., the defendants undertook and promised the plaintiffs to re-purchase the same from them at the price the plaintiffs should have given for the same. Corresponding breaches were assigned to the special counts; and the declaration likewise contained the common counts.

The defendants pleaded the general issue. The circumstances of the case were these. The plaintiffs are eminent brokers in the *West India* trade,

1. It is not necessary that a broker should insert the name of his principal in a contract which he makes for him. It is sufficient, if, upon a demand of his contract-book, he be ready to produce it, and the name of his principal be recorded there.

2. *Semble*, if a broker make a contract contrary to the regulations of the city of London, and in violation of the bond into which he has entered with the Mayor, Aldermen, &c. he is not therefore disqualified from bringing an action on a contract so made, in contravention of his duties under the bond. The remedy against him is an action for the penalty of the bond, and the contract is not, *ipso facto*, void.

3. The course of dealing between the principal and the broker may authorise the latter to make contracts for the principal, in his (the broker's) own name, which will bind the principal to a performance.

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and the defendants had been in the habit of employing them to make purchases. On the 21st of *December* 1815, one of the defendants, with Mr. *Kemble* the plaintiff, went to the sale room of Messrs. *Woodhouse* and Co. They selected fifty-seven hogsheads of sugar, the property of Messrs. *Peat, Litt, and Steel*; and Mr. *Litt*, one of the proprietors, being present, the price was settled, and the bargain struck. Mr. *Litt* expressed a disinclination to make any contract with the defendants; accordingly, the contract was made between Messrs. *Peat, Litt, and Steel*, and the plaintiffs, as if they (the plaintiffs) were the buyers; although Mr. *Litt* was aware at the time that they only acted as brokers. The plaintiffs having effected the contract, delivered to the defendants the following bought note :

“ 21st *December*, 1815.

“ Bought for *John Atkins*, Esq. and Son, of *William Peat, Litt, and Steel*, (in our name,) 57 hogsheads of *Jamaica* sugar, at 86*sh.*—Dock tare.—No duty.

“ *Thomas Kemble*, Son, and Co.”

This contract note was sent by the plaintiffs to the defendants in a letter on the day on which it bore date. In the letter they stated, that the reason why they had the contract made out in their own names was, that Mr. *Litt* had refused permission to his broker, Mr. *Woodhouse*, to make out the contract in the defendants' names, conceiving that he was selling to the plaintiffs; and, on that account, he had let them have the sugar at a lower price.

On the receipt of the bought note the defendants wrote to the plaintiffs, demanding a contract in the name of their own house ; adding, that Mr. *Litt*'s conduct was a reflection on their credit ; and they desired the plaintiffs to state to Mr. *Litt*, that the moment the sugars were weighed off, they would pay cash for them, with the usual allowances.

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Before this letter was received, Messrs. *Kemble* and Co. had completed the contract with Mr. *Litt*. An application, however, was made to Mr. *Litt* to alter or vacate the contract : he declined doing it, and this determination was instantly communicated to the defendants.

In consequence, the defendants rejected the contract, and sent back the bought note ; but they did not return the delivery note until the 12th of *January*.

The plaintiffs shortly afterwards sold the sugars, giving proper notice to the defendants ; and the price having fallen, the differences between the sums at which they were bought, and the sums netted upon resale, amounted to 335*l.* 19*s.* 4*d.* : to recover which the present action was brought.

Upon the part of the plaintiffs several merchants and brokers were called, who stated, that it was very customary for the seller of goods to make the contract with the broker, and to give the credit to him ; although the name of his principal was declared at the time of the bargain : that this was a very general mode of conducting business,



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from the circumstance of the credit of the broker being, in most instances, better known than that of the merchant. It was evident that the plaintiffs had declared the names of their principals, and that Messrs. *Litt* and Co. had the option of making out the contract to the defendants, but declined so to do; and that the sugars were sold at a lower price on account of the contract being made personally with the plaintiffs. It was likewise in evidence that the defendants, in their dealings with the plaintiffs as brokers, had recognized transactions precisely similar to the present; and had paid upon contracts made by the plaintiffs, in their own names, for the defendants as their principals. Some brokers likewise stated, that it was an invariable rule in the *West India* trade, when a principal, the buyer, was not well known, or approved by the seller, to make out the contract in the broker's name. Other brokers spoke to the same mode of dealing in transactions in which they had been concerned for the defendants, who had made no objection, but had paid upon such contracts.

*Shepherd*, S. G. for the defendants, contended, 1. that the mode of dealing, which the plaintiffs represented to be the usage of the trade, and upon which they rested their right to recover in the present action, was contrary to law, in direct repugnance to the regulations made by the City of *London* for carrying on the trade of a broker, and in violation of the bond, which the plaintiffs, as brokers, had given to the Corporation. 2. That it was a most dangerous practice, and had a

tendency to monopoly : that the plaintiffs had no right to become principals, and to introduce themselves into a contract against the will of those who employed them. That brokers were to abstain from all traffic themselves, and to act as indifferent parties between the buyer and seller. 3. That, though the practice had been stealing on a long time, it was not too late to reform it. That the defendants rejected the contract directly it was transmitted, upon the simple and sufficient ground, that the broker's name was inserted in the bought note. That they were justified in so doing ; and could not be compelled to accept a contract made in direct opposition to the authority given to the plaintiffs.

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The town clerk produced the regulations made by the Court of Aldermen, in pursuance of the 6 Anne, c. 16. sec. 4. The bond of the plaintiffs was likewise produced, in which all the regulations are engrafted :—It was in the penal sum of 500*l.* (a).

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(a) The condition of the Bond is as follows :

“ Whereas the above-bonded (mentioning the broker's name and description) is, by the Court of Lord Mayor and Aldermen of the city of London, allowed to be admitted and sworn a broker, within the same city and liberties thereof, to have, use, and exercise the said office and employment during the pleasure

of the said Court, and no longer. Now the condition of this obligation is such, that if the said (broker's name) for and during such time as he shall and doth continue in the said office and employment, shall well and faithfully execute and perform the same without fraud, covin, or deceit ; and shall, upon every contract, bargain, or agreement by him made, declare

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*Best*, serjeant, for the plaintiffs, *contra*.—1. That supposing the plaintiffs had infringed the condition of their bond, it was no answer to this action. The Chamberlain of the City must sue for the penalty. But the plaintiffs had neither broken any of the

and make known to such person or persons with whom such agreement is made, the name or names of his principal or principals, either buyer or seller, if thereunto required; and shall keep a book or register, and therein truly and fairly enter all such contracts, bargains, and agreements, within three days at the farthest after making thereof, together with the names of the respective principals for whom he buys or sells; and shall upon demand made by either of the parties, buyer or seller, concerned therein, produce and shew such entry to them, to manifest and prove the truth and certainty of such agreements. And for the satisfaction of all such persons who shall doubt whether he is a sworn broker or not, shall upon request produce a medal of silver with his Majesty's arms engraven or stamped on one side, and the arms of this city with his name on the other. And shall not directly or indirectly by himself or any other, deal for him-

self or any other broker in the Exchange, or remittance of money, or in buying any tally or tallies, order or orders, bill or bills, share or shares, or interest in any joint stock, to be transferred or be assigned to himself or any other broker, or to any other in trust for him or them; or in buying any goods, wares, or merchandizes, to barter or sell again, upon his own account, or for his own or any other broker's benefit or advantage; or make any gain or profit in buying or selling any goods, over and above the usual brokerage. And shall and do discover and make known to the Court of Lord Mayor and Aldermen in writing, the names and places of abode of all and every person and persons, as he shall know to use and exercise the said office or employment, not being thereunto duly authorised and empowered as aforesaid, within thirty days after his knowledge thereof. And shall not employ any person under him to act as a broker within the said city

regulations made by the City for the office of a broker, nor violated the conditions of their bond. It was not contended that they had bought for themselves at one price; and, having become purchasers, re-sold the same to their principals at an advance. On the contrary, the name of their principals was disclosed at the time of the bargain. They acted solely in the character of brokers; their names were used in the contract *as* brokers; although, by the terms of the contract, they became responsible to Messrs. *Litt* and Co. It was not necessary that the name of the buyer or seller should appear on the face of the contract. All the broker was required to do was, to record the name of his principal in his books, and to declare it when called upon. He insisted, that the regulations of the City, and the conditions of the bond, had been fully satisfied.

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and liberties thereof, not being duly admitted as aforesaid.— And shall not presume to meet and assemble in Exchange-alley, or other public passage or passages within this city and liberties thereof, other than upon the Royal Exchange, to negotiate his business and affairs of brokerage, to the annoyance and obstruction of any of his Majesty's subjects, or any other, in their business or passage about their occasions; then this obligation to be void

and of none effect, or else to be and remain in full force and virtue." —

#### BROKER'S OATH.

" You shall sincerely promise and swear, that you will truly and faithfully execute and perform the office and employment of a broker between party and party, in all things appertaining to the duty of the said office or employment, without fraud or collusion, to the best of your skill and knowledge."

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2. That the defendants, by their previous habit of dealing with the plaintiffs, independent of the almost universal usage of the *West India* trade, had given an implied assent to the present form of the contract.

DALLAS, J.—This is a question of the most important and extensive consequences. The first inquiry will be, whether the plaintiffs were authorised by the defendants to make the contract, in their own names, from the previous course of dealing between the parties. They do not insist that they had any specific authority to introduce themselves into the contract. This will be a question of fact for the Jury. 2d, If the plaintiffs had such authority, could the defendants, by law, confer such a power, and the plaintiffs exercise it.

This last question I shall not determine. It is of serious magnitude; and I shall reserve it, if it becomes necessary, for the opinion of the Court. Undoubtedly, if I were to give an opinion on the subject, I should be inclined to say, that there was nothing illegal in the transaction. It is not necessary that the principal's name should appear on the face of the contract. It is sufficient if the name of the principal be entered in the broker's book, and declared when properly demanded. In the present case there was no concealment of the principals. Nothing in the nature of fraud is insinuated. The plaintiffs, it is admitted, have entered the names of the defendants in their books, and it was known to Messrs. *Litt* and Co. for whom they acted.

The bought note itself describes the character in which the plaintiffs dealt. If the plaintiffs have proceeded without authority in making the contract in their own names, the defendants were entitled to reject it, and they have done so in time. They receive the contract on the 21st of *December*, and repudiate it on the same day. I think there is no usage on the subject which can be considered as a custom of trade. Sometimes the broker inserts his own name in the bought note, and sometimes he does not. But, upon the principal point, whether the law authorises the broker to make such a contract as the present, I desire to give no opinion. In the shape in which the case presents itself, it makes no difference whether the breach of the law is attended with a penalty, or whether it is to be construed to operate directly on the contract. I think it a question of fact for the Jury, with reference to the course of dealing between the parties, taking likewise into their consideration the practice (which, though not an universal usage, had prevailed in the trade,) to say whether the defendants gave the plaintiffs authority to buy in their own names.

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The Jury found a verdict for the plaintiffs.

*Best*, and *Vaughan*, serjeants, and *Taddy*, for the plaintiffs.

*Shepherd*, *S. G. Lens*, serjeant, and *Bolland*, for the defendants.

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In the ensuing term a new trial was moved for, but unanimously refused by the Court.

There is a manifest distinction between a disqualification founded upon a general law, and one resulting from a municipal regulation; the latter authority, as the less, having of course no operation in derogating from the extent of the former. It may, therefore, be laid down as a general rule, that contracts, good by common and statute law, are not invalidated by the regulations and bye-laws of corporations or companies, who, for the management of their own particular concerns, have subjected themselves to certain restrictions and limitations. Such bye-laws or regulations are only laws amongst themselves, and have no other penalty or obligation annexed to them, than such as attaches by means of some external contract, which has its force, not in the bye-law, but as an instrument or compact recognizer by general law. Thus, a man may bind himself, as between party and party, not to do some certain particular act, and yet do such act, and still have his legal right of action, (if a contract,) upon it. The remedy for the injured party, under this breach of their pri-

vate engagements, is upon the infraction of the first obligation, which he must seek according to its nature. But it is otherwise, if such bye-laws be adopted by letter or construction in any general law or statute, by which such corporations are recognized or constituted. As for example, in many of the acts recognizing the trading of the *East India* and *South Sea Companies*, &c. In the case of *Dyster* in the matter of *Moline*, 2 Rose 349. in which the question was upon the extent and nature of a broker's bond to the city of *London*, the Lord *Chancellor*, in that case, determined, that a broker of the city of *London* might maintain an action on a contract, or sustain a proof for a debt, arising out of transactions as a merchant, although such transactions were in contravention of the regulations under which he derived his office, to the condition of the bond which he executed, and to the oath which he took upon his appointment. But that he could sustain no action on a contract arising out of a transaction in which he acted both as broker and principal; all such dealings being essentially fraudulent, illegal, and void, upon principles of common law.

It was contended by the

counsel in that case, that the 6 Anne, c. 16. s. 4. (which gave the corporation of *London* the power of admitting and regulating the duties of brokers) adopted, constructively at least, the bye-laws of the city as part of the statute; the words of the statute being, "that the court of mayor and aldermen of the said city, for the time being, should admit such brokers, under such restrictions and limitations for their honest and good behaviour, as that court shall deem reasonable." Now, in the year 1708, being the year after this act, the mayor and aldermen made their rules and regulations for the government of brokers, which have ever since been, and still are, in force; and by virtue of which they demand a bond from the broker, with a penalty, and also require him to take an oath; the forms of which bonds and oath are prescribed by the same rules and regulations. (See note, ante p. 431.)

But the Lord Chancellor, (*Eldon*) in adverting to the argument of counsel, and on giving his judgment, observed, "that if, under the words 'limitations and restrictions,' adopted in the statute of Anne, the mayor and aldermen, &c.

of the city of *London* had the power of giving to their municipal ordinance the effect of a legislative prohibition, and of incorporating it in the law of the land, they have not done so. All they have done is to provide that, if a broker shall act in a manner contrary to that which the policy of the law thinks ought to govern his conduct, he should forfeit his bond, and be dismissed from his situation; and they have added to this the hold upon his conscience by the solemnity of an oath. If, however, he is bold enough to incur the consequences of a violation of his duty, they have not said that *he shall not*. The objection has been frequently taken and over-ruled at *Nisi Prius*; and I apprehend upon this view of it, viz. that the penalty of this conduct is the forfeiture of his bond and of his office. The oath not receiving a larger construction than as binding him to deal fairly as a broker; but not adopting, in that construction, all the circumstances of the condition of the bond."—2 *Rose's Bankruptcy Cases*, 354. Hil. term, 1816.

But in the same case his Lordship observes, that if a broker "has introduced himself as broker and principal in

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the same transaction, a contract, arising out of such conduct, would, without reference to any act of parliament, or other regulation, but upon principles of common law, be good for nothing. No action could be sustained upon a transaction so fraudulent. A broker is to be considered either as an agent of the seller or of the buyer, or of both; bound honestly to exercise his skill, and fairly to communicate his opinion upon the subject of the purchase to those who, for that purpose, have confidently employed him. And it requires little observation to shew, how disqualifying a circumstance to the fair discharge of that duty will arise from the interference of his own interest. It would be impolitic and dangerous to enforce a contract arising out of such circumstances."

The following case was tried in the sittings after Michaelmas term last, at Guildhall, before Lord *Ellenborough* and a special jury, *December 20, 1816*. In Hil. Term, 1817, a motion was made to set aside the nonsuit (which was the result of the case at *Nisi Prius*); but the Court unanimously approved of the opinion expressed by the judge upon the points as they severally arose in the case:

The LORD MAYOR of *London*  
 v. JOSEPH ISRAEL BRANDON.

This was an action against the defendant, a sworn broker of the city of *London*, upon the bond given by him on being admitted to that privilege. Five breaches were assigned, and the penalty sought to be recovered was 500*l*. The first was for fraudulently and covenantously making out an invoice of 60 cases of tobacco, sold by a person of the name of *Cohen*, and bought by a Mr. *Splügerber*, through the agency of the defendant; the second, that the defendant, being required by Mr. *Splügerber* to pay certain sums of money for ship-charges, &c. had fraudulently and covenantously demanded from his employer more than he had paid; the third, that he had made a false entry of the invoice in his contract-book, by stating the number of pounds contained in certain cases of tobacco, instead of setting out the number of cases only; the fourth, that he had refused to allow his employer, Mr. *Splügerber*, to inspect his contract-book when lawfully required for that purpose; and the fifth, that he had allowed his brother "to act under him," as a broker, and to make contracts in his own name.

The first, fourth, and fifth breaches were principally relied upon by the counsel for the plaintiff.

The principal facts connected with the case were these:—Mr. *Splügerber* employed the defendant, a tobacco-broker, carrying on business under the firm of *Brandon and Sons*, to make a purchase of tobacco for him; and the contract was dated in the month of *September*, 1810. The purchase was made from one *Cohen*, and consisted of 60 cases. They were shipped for *Stettin*, and were returned to *England* on the ground that the real weights did not tally with those stated in the invoice by 11,755lb., the value of which exceeded 600*l*. This variance was charged upon the defendant as a fraud with intent to benefit himself personally, and was the foundation of the first and principal breach. The tobacco was subsequently exported by a Mr. *Pearson*; and *Splügerber* brought an action against *Cohen* for the difference, in which he produced the defendant as a witness, and recovered a verdict for 672*l*. The fourth breach was connected with this transaction: the defendant having refused in *March*, 1815, to allow *Splügerber* to inspect his contract book; and the

fifth breach applied generally to the mode in which the defendant, assisted by his brother, *Joshua Brandon*, transacted the business of the house of *Brandon and Sons*.

The evidence applying to the first charge was chiefly documentary, and consisted of the invoice, the books of the defendant, and others produced from the Custom-house: the most important of the latter was the landing-ledger, in which it was stated that the net weight was the same as that contained in the invoice made out by the defendant; but a reference was made, in red ink, to another book, in which the tares of the packages or cases containing the tobacco were entered. By the evidence of a Mr. *Legg*, and particularly upon his cross-examination by *Scarlett*, (on behalf of the defendant) it appeared, that previous to the proclamation of the 3d of *June*, 1810, when tobacco was imported in hogsheads, the *net* weights only were mentioned in the landing-ledger, the commodity itself being turned out into the scale. After that date, however, when cases and other packages were allowed to be used, a different practice prevailed, and the *gross* weights only were entered.

The testimony in support of

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the fourth breach was chiefly that of a Mr. *H. G. Arnauld*, who deposed, that on the 4th of *March* the defendant had refused to allow *Splügerber* to inspect his contract-book, adding, that it should be produced at the proper time: on the day following it was laid before the Court of Aldermen, who had assembled for the purpose of investigating the subject.

Lord *Ellenborough* intimated a decided opinion that this refusal could not be considered a breach of the condition of the bond: the defendant had only refused conditionally, and had laid his book before the Court of Aldermen the next day, as the proper time for doing so.

Witnesses were then called to support the fifth breach, that the defendant had allowed his brother, who was not a sworn broker, to act under him. Three witnesses produced several contracts for tobacco, made out and signed by the defendant and by *Joshua Brandon*: but none of them could distinctly swear that they had negotiated with *Joshua* only, in any single transaction; they agreed that the business was transacted by both of them, indifferently and together.

Upon this evidence Lord *Ellenborough* thought, that the conduct of the defendant and his brother could not be brought within the precise terms of the bond. It could not be said that *Joshua Brandon* acted under *Joseph Brandon*, for they seemed to have a concurrent and equal authority: if the city of *London* wished to prevent this practice in future, they must alter the wording of the bond; the mischief was equal, but it was not provided against.

The case on the part of the plaintiff was thus reduced to the first breach, for fraudulently and covenantously making out an invoice containing false weights of the tobacco sold.

Scarlett, for the defendant, contended, that this was a most hard and oppressive action; that the acts of the broker, as their duties were defined by their bond to the city of *London*, and the regulations made by the mayor, &c. were not to be jealously and narrowly scanned, but interpreted with a large and liberal equity. The question had not often arisen upon the assignment of such bonds in actions like this. The intention of the broker was to be looked to. Did he mean a fraud? It was incredible that he had any fraudulent purpose. Money, the

moving motive of fraud, could not be his object in the present transaction. Admitting that he was negligent, all interest in the misrepresentation was fully rebutted.

The foreman of the jury intimated, that neither he nor his brethren believed that the defendant had made out the invoice with a fraudulent intent.

Lord *Ellenborough* expressed precisely the same opinion: one essential circumstance to induce the belief of a fraudulent purpose, viz. pecuniary advantage, was wanting; but the defendant's commission did not depend upon the number of pounds stated in the invoice, but upon the number of cases, which he could not vary. His Lordship, however, thought, that though not a case of fraud, it was one of gross negligence on the part of the broker, for which he might be liable to an

injured party. If a change in the mode of transacting business was made at the Custom-house, it was the duty of a broker to know it, and to govern himself by it.

One of the jury observed, that it was no part of the province of the broker to furnish weights: the purchaser, for his own satisfaction, might ascertain that they were correct.

Lord *ELLENBOROUGH*.—When the city of *London* appoint a broker, they expect that his dealings shall be conducted with perfect veracity; and the defendant would do well, in several particulars, to amend his practice. Though the employment of his brother may not be within the strict words of the bond, yet it is clearly within its spirit and meaning; his books ought also to have been produced on demand.

The plaintiff was nonsuited.

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PROSSER v. SMITH.

A. B. and C. are traders; they employ an attorney, who is likewise employed by D., a creditor of their firm, and who afterwards becomes petitioning creditor under a commission of bankrupt issued against them. The attorney advises A. B. and C. to become bankrupts; and, in order to procure an act of bankruptcy, he takes D. with him to the respective houses of A. B. and C.; having first concerted with them, that they should respectively deny themselves when D. called. Held, that although D. was not privy to such denial, yet, inasmuch as the attorney was the agent of D. as well as of A. B. and C., and accompanied him for the purpose of procuring such denials; that such denials, therefore, were fraudulent acts of bankruptcy, and could not support a commission on which D. stood as the petitioning creditor.

THIS was an issue directed by the Lord Chancellor to try the validity of a commission of bankrupt, issued against *J. Brown, jun. W. C. Brown*, and *J. Morse*, copartners and clothiers, carrying on business at *Stroud*, in *Gloucestershire*. A person of the name of *Smith* was the petitioning creditor. The docket was struck on the 22d of *April* 1816, and the commission regularly opened a few days afterwards. The case contended upon the part of the plaintiff (as directed by the issues) was, that the several alleged acts of bankruptcy were fraudulent and preconcerted. This was denied by the defendant.

Several witnesses were called on the part of the plaintiff, who proved that, on *Monday* the 22d of *April*, *Smith* the petitioning creditor called at the respective houses of the bankrupts, (each partner having a distinct residence) about nine o'clock in the evening; and each partner, though at home at the time, was ordered to be denied. It appeared likewise that the attorney of the bankrupts, who was also the attorney of the petitioning creditor, was at the house of each when the petitioning creditor called. There was likewise evidence that the attorney accompanied the petitioning cre-

ditor in his circuit to the house of each partner ; that he went on a little before him, and prepared the bankrupt for his calling, when the servants were instructed to deny him. Another act of bankruptcy was relied upon, which was an assignment of all the effects of the bankrupts to their foreman, whose name was *Grist*, in consideration of five shillings. This deed was prepared by the attorney, on the morning of the 22d of *April*, by the instruction of the bankrupts. They executed the deed, and *Grist* the foreman signed it ; but it was in evidence that, at the time *Grist* signed it, it was not read to him ; and he was ignorant of its contents. *Smith*, the petitioning creditor, was not privy to this deed ; and did not know of its existence till the opening of the commission. This deed recited that the bankrupts had been denied to their creditors. *Croom*, the attorney, however, had advised *Smith* to take out a commission : and when upon this recommendation *Smith* said—“ Though you know they have committed an act of bankruptcy, how do I know it ? ” *Croom* replied—“ They intend to shut themselves up in their houses, and not to see a single creditor. I am now going to them ; and, if you please, you may call there also, and see the state of things.” *Croom*, however, stated, that he never told *Smith* that the bankrupts would be at home and denied ; but he admitted that, when *Smith* went with him, he did not go with the expectation of obtaining any money. The petitioning creditor and the attorney parted after this conversation : *Croom* went first to the house of *Morse*, and then to the houses of the

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two *Browns*, when the denial took place as above stated.

Best, serjeant, for the plaintiff, contended—

1. That these were fraudulent and concerted acts of bankruptcy. Whatever negotiation had taken place between the bankrupts and their attorney, provided *Smith* had been excluded from the plot, and, without any privity or participation, had gone to demand his debt, and the bankrupts had denied themselves, it might then have been a question whether an act of bankruptcy had taken place, by this premeditated denial to a creditor, concerted between the bankrupts and their solicitor. But, in the present case, *Croom* is the agent of all the parties, of the petitioning creditor as well as of the bankrupts. *Smith* called, not to demand a debt; not in expectation of payment; but after having been persuaded by the solicitor to take out a commission, he calls, in order to *bespoke* an act of bankruptcy. It was to be inferred that *Smith* knew that acts of bankruptcy were to be committed when he went his round with the attorney to the respective houses of the partners. Now the law says, that a commission, founded on pre-concert with the petitioning creditor shall not stand.

2. With respect to the pocket act of bankruptcy, the assignment to the foreman, it was an artifice which could impose on no man. The bankrupts never intended to assign their effects: the assignee never intended to claim under this deed. He had signed it without knowing a word of its contents. It was, therefore, intended to be ineffectual in

every other view but that of constituting an act of bankruptcy.

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Shepherd, S. G. contra.—1. A trader has a right to commit an act of bankruptcy; and no negotiation between him and his attorney for that purpose could invalidate the act; provided it were *bonâ fide* towards the creditors, and none of them concerted it, or were privy to it. The bankrupts had committed two acts of bankruptcy sufficient to uphold the commission. *Smith* did not know of the deed of assignment. That deed itself, by which the bankrupts conveyed away all their property, is an act of bankruptcy. The recital did not alter its effect. No matter to whom they convey. They part with all their property by deed. This deed, without question, is revocable by the bankrupt laws; but the fact of such a conveyance constitutes an act of bankruptcy. If *Smith* had been privy and assenting, that circumstance would have impeached the deed; but the contrary is in evidence. He did not know of it till the commission was opened.—2. The denial to *Smith* was a clear act of bankruptcy. This denial was not concerted between *Smith* and the bankrupts, which circumstance alone it is that makes the act of bankruptcy fraudulent. It is immaterial that *Smith* went to their respective houses, not expecting money. The denial to a creditor is an act of bankruptcy; because it is evidence of a beginning to keep house with a view to delay creditors.

BURROUGH, J.—I am of opinion that these were

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fraudulent and concerted acts of bankruptcy, and I shall direct the Jury accordingly. Laying the deed out of consideration, which was evidently contrived for the purpose, there were three concerted acts of bankruptcy, committed most glaringly in the sight of the petitioning creditor, through the medium of his own, and the bankrupts' solicitor, who goes from house to house for the purpose. The only question then is, was *Croom* the agent of *Smith*? If the Jury, under the circumstances, think he was such agent, the commission cannot stand.

The Jury found a verdict for the plaintiff.

Best and *Vaughan*, serjeants, and *Campbell*, for the plaintiff.

Shepherd, S. G., *Lens*, serjeant, and *Tindall*, for the defendant.

Cases of difficulty have arisen upon the question, how far a commission of bankrupt can be supported, which is founded upon an act of bankruptcy, either committed *voluntarily* by the trader, and with the *intent* of making himself a bankrupt by such act, but without the privity or concurrence of his creditors; or upon an act committed by the

trader in concert with his creditors.

With respect to the first point: If the act of bankruptcy, on which the commission is sought to be sustained, be an act, moving solely from the bankrupt, as a denial to a creditor, or an assignment by deed of all his effects, though such denial or assignment should be with the intent

of making himself a bankrupt, it is not easy to see how an objection could be raised to such act, as incapable of supporting a commission. The bankrupt cannot object to such act himself: he is of necessity concluded by it. Who then is to impeach it? A case is put, which is very frequently resorted to as an act for sustaining a commission of bankrupt. A trader conveys all his property by deed to a particular creditor, or to a certain number of creditors; or to trustees, for the satisfaction of his creditors universally; all of which acts are acts of bankruptcy. The trader *knows* that he is committing an act of bankruptcy; he knows that the deed is *void*, and he *intends* that it should be void at the time of execution. Can such deed, it is said, sustain a commission? Can such deed (which constitutes an act of bankruptcy upon these two grounds only, 1. Either that it is a fraudulent preference of particular creditors; or, 2. That it places his property under a distribution different from that ordained by the bankrupt laws, and which deed is not intended by the bankrupt to operate in either of those ways, but to exclude the power of fraudulent preference on one hand,

and to let in the operation of the bankrupt laws on the other); can such deed, it is demanded, be sufficient to uphold a commission? The case has not arisen; but when it shall arise, we presume that such act *would* support a commission.

That a commission of bankrupt may be supported, notwithstanding the privity of the bankrupt, is now settled. *Ex parte Edmonson*, 7 Vez. Jun. 303. The only objection is, to an act concerted with a creditor.

Now, it is no objection to any act, as an act of bankruptcy, that the bankrupt intended it to be so; and this rule is founded upon manifest and sufficient grounds; for, in the first place, it may be the only means of rescuing his property from the urgent pressure of one particular creditor, and thereby bringing it within the equitable distribution of the bankrupt laws. In the first construction of these laws, and the judgment of the Courts upon them, bankruptcy appears to have been regarded in two points of view; in the first place, as criminal insolvency; and, secondly, as a condition of necessity. Under neither of these points of view, therefore, could any voluntary act

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of the trader, by which he constituted himself a bankrupt, be regarded as admissible in law; or, in other words, as *not criminal*. The bankrupt, therefore, was always viewed in the light of a criminal; and therein the act of making himself a bankrupt voluntarily was treated as a fraud. But further experience has exposed the fallacy, and, indeed, the great practical mischief of such a doctrine in fact. The Courts, therefore, proceeding now upon a more liberal construction, look, not so much to the act itself, as to the act in connection with the condition of the affairs of the bankrupt, and with the circumstances which precede and follow it. If, therefore, upon such examination, they find such voluntary act of the trader to be a mere *bona fide* declaration of his insolvency; or, as it were, a surrender of himself and his property to the bankrupt laws, it is the practice of the courts of law and equity to deem such act and commission thereon founded perfectly sufficient. But as, in cases where the bankrupt commits this voluntary act in *concert* with one of his creditors, there is a manifest presumption that such creditor is to have some peculiar interest above the others,

the law very properly discountenances such concert and private agreements; and therefore, arguing upon the legal nature of bankruptcy as a crime, determines that no creditor shall avail himself of a criminal act which he has caused to be done.

As respects a creditor under these circumstances, such act is no act of bankruptcy: but as such act is still the index of that condition of affairs which the law determines to be insolvency; such act, though insufficient as respects the creditor and trader who concerted it, is sufficient to uphold a commission by any other creditor. For example, a concerted assignment of effects, which is the case put, cannot be insisted upon as an act of bankruptcy by any creditor, a party to such conveyance, or privy to such conveyance. *Bamford v. Baron*, 2 T. R. 594. *Back v. Gooch*, ante, p. 13. and *Tappendall v. Burgess*, 4 East 230. But any creditor, not privy nor consenting, but arriving at the knowledge of it, may of course secure his own equity of distribution by taking out a commission upon it; or otherwise, the trustee of such deed might become possessed of the whole property, and exclude other

creditors. The act, therefore, is evidently an act of bankruptcy as affects the other creditors. But it is not so in the case of a *concerted denial* to one creditor; for such denial being by *concert*, is no sign, symptom, or act of insolvency; and nothing can be founded on it; which is otherwise in the case of the deed.

In *Hooper v. Smith*, 1 Black. 441. Lord Mansfield says, "The relation of a commission of bankrupt to the time of committing the act, though useful to prevent frauds, is sufficiently hard already upon private persons; and ought not to be extended farther. An act of bankruptcy in the eye of the law is considered as a crime;—but where is the crime of denying oneself to another by previous consent and agreement."

But although a concerted act of bankruptcy is not available, except for creditors not privy to it, yet a commission upon a concerted act of bankruptcy may be supported upon another act. *Ex parte Bourne*, 16 Vezey Jun. 145. In this case, the Lord Chancellor (*Eldon*) expresses himself as follows: "I recollect cases in which it was settled upon a singular ground, that an assignment of all the property is

an act of bankruptcy, though the direct and immediate object is not to delay but to satisfy the creditors. But it was held, that a trader had not a right by deed to place his property under a distribution different from that directed by the bankrupt law; and it was carried to this extravagant length, that, though the assignment was intended for the benefit of all the creditors including that one, yet it was an act of bankruptcy.

In the case of *Bamford v. Baron*, 2 T. R. 594, *note*, in which I was counsel, an attempt to set up such an assignment as an act of bankruptcy, was made by a person who was a party to the transaction; and the opinion of the Court was, that such person could not represent it as an act of bankruptcy; that, according to the common expression, *his* mouth was shut. But the understanding of the bar was, that there was nothing to prevent *another* creditor, not a party to the transaction, from treating that as an act of bankruptcy; an inference favoured by the expression, that the mouth of that particular creditor was shut; and I believe many commissions have been in fact supported upon such acts of bankruptcy, by persons not parties

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to them. If that can be maintained as to an assignment, a denial by agreement between the creditor and the debtor must be considered equally liable to objection, as a concerted act of bankruptcy. It

is clear, therefore, that this commission, standing on a concerted act, cannot be supported. I should be inclined to give to another creditor, not a party to that act, the opportunity, if he can, of sustaining it."

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SUMMER ASSISES, 56 GEORGE III. 1816.

FARMER v. JOSEPH.**July 22.**

THIS was an action for the seduction of the plaintiff's daughter. The only point was the manner in which the cause was conducted on the part of the plaintiff, who was a working man, and had nine children. The eldest, for whose seduction the present action was brought, had been at service in the family of the defendant's uncle. Suspicion had attached upon her intercourse with the defendant; she was in consequence removed to another situation, from which she returned to her father's house. Here she was again in the habit of receiving her seducer with the privacy of her father, and of sitting up with him at late hours of the night, after the family had retired to rest. A younger daughter of the plaintiff proved the acknowledgment of the defendant that he had seduced her sister, and that he was the father of a child which she had borne. After some evidence of the defendant's circumstances, the plaintiff's counsel rested the case here, and the girl herself was not produced as a witness.

In an action brought by a parent for the seduction of his daughter, it is not necessary, to sustain the action, that the daughter should be produced as a witness at the trial.

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Hullock, serjeant, for the defendant, contended, that the case of the plaintiff, left so bare of evidence, should be dealt with upon the strict legal principles on which this action was founded; and that the ~~damages should not~~ exceed the value of the service ~~actually~~ lost. He admitted that, in most cases of this sort, the condition of service was regarded as a mere conveyance to the action. It was the form through which the injury was presented to the Court; and, having obtained its admission upon legal principles, it brought along with it, as parts of itself, all the circumstances of the case. But, where the object of seduction was ~~not herself produced~~, the strongest suspicion ~~attached to the quality of the injury~~. He contended, therefore, that the Jury ought not to ~~estimate the damages upon the ordinary principles which obtained in cases like this~~.

Mr. Baron Wood.—The plaintiff has his right of action for the loss of the services of his daughter; a loss which he says he has sustained by the seduction of the defendant. It was not necessary to produce the daughter, though the withholding of her is open to observation. In strictness, this action being founded on the loss of service, the damages ought to have a reference to the extent of the service withdrawn. But an injury of this kind is always complicated with circumstances; and it is difficult to separate one part from the other. Undoubtedly, if the girl had been produced, the case in all its bearings would have been better understood. But the plaintiff's counsel had a right to exercise their discretion upon this subject.

The Jury found a verdict for the plaintiff, damages 300*l*.

Scarlett and Williams, for the plaintiff.

Hullock, serjeant, and ——— for defendant.

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In the ensuing term, *Hullock*, serjeant, moved for a new trial, upon the ground of excessive damages, and dwelt strongly upon the circumstance of the plaintiffs not producing his daughter at the trial. The Court said, that the fact of not calling the girl as a witness was only matter of observation to the Jury; and they refused to grant a rule to shew cause on the point of the damages.

The action of seduction, in its present extent, may be regarded almost as the happy invention of the last fifty years; an invention by which the courts have assisted and supported the interests of morality, whilst, at the same time, by adhering to the forms of law, and a reasonable fiction, they have not departed from the necessary precision of legal principles. The reasonable fiction, namely, that of

loss of service, is employed, as we see, merely to bring the matter into the Court; merely as a name and legal term for the injury, which the jury may estimate according to all the circumstances before them. And as this loss of service is employed only for the purpose of producing the action into Court, it seems to be considered, after the action is so introduced, as merely formal. Therefore, the actual loss of service, like the *quo minus* in the Exchequer process, is almost impertinent to the action itself; and the Courts will accordingly entertain the action in cases where such service is in itself totally without value, and in its quantity a mere single act. But the fact of service, however small, must exist—The action must have footing ground.

Thus, for example, in the case of a distant relation, living with a male friend, in *loco*

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parentis; or an orphan in the same manner; and in a condition of life (such as that of a gentleman) where no actual service can be imagined, in the common sense of that word: the Courts, however, will, in all these cases, admit the action; it will suppose such a service as that of a daughter to a father; a domestic attendance and obedience; and, upon this ground, will not suffer the question of service, and therein the jurisdiction of courts of law over the action, to be disputed. And with respect to the relation of the parent, guardian, protector, or master, bringing the action, the law is equally satisfied with any thing approaching to the nature of a *pater familias*; or even with

the more remote character of a protector, or domestic benefactor, from Christian duty.

We have conceived it necessary to explain the nature of this action, as cases are occurring every day in which more importance is assigned to the mere formal part of the action than belongs to it. Vide *Dean v. Peel*, 5 E. R. 45. and the cases cited in the argument and the notes. *Bennett v. Allcott*, 2 T. R. 166. 3 Burr. 1878. *Fores v. Wilson*, Peake N. P. 55.; and *Irwin v. Dearman*, 11 East 23., in which it was held, that this action could be maintained for the seduction of an *adopted* child. And in *Edmonson v. Machell*, 2 T. R. 4., it was adjudged that it might be brought by an aunt for the seduction of her niece.

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JACKSON v. STACEY.

TRESPASS for breaking the plaintiff's close. The land in question was a head-land, or piece of ground, between a close belonging to the plaintiff, and some land of the defendant's, who had a quarry in his field, from which he was in the habit of carting lime daily over the *locus in quo*. The defendant pleaded, 1. Not guilty. 2. A general right of way over the *locus in quo*. 3. A right of way, at all times, and for all purposes, in virtue of his occupation of an adjoining field. 4. A general right of way which he claimed under a non-existing grant. The plaintiff took issue upon these pleas; and likewise made a new assignment, denying the defendant's right of using the road for general purposes.

A right of way for agricultural purposes is a limited and qualified right of way, and does not, necessarily, confer a right to use such way for general and universal purposes. Therefore, where *A.* claimed and proved a right to carry corn and manure over the *locus in quo*, Held, that he had not, therefore, a general and unlimited right to carry lime, or the produce of a quarry over the *locus in quo* at all times, and for all purposes.

It appeared that the defendant had bought the field, in which the lime quarry was, from one *Poole*; that the quarry had been first opened about 15 years ago; that he had paid an acknowledgment for the use of another road more circuitous than that over the head-land, and had only used the *locus in quo* within the last two years. But there was evidence that the head-land, which was generally cultivated, had been always used by the occupiers of the defendant's field as a road for agricultural purposes; and that the former occupiers had sometimes trodden down the crops whilst they were so using it. There was likewise some slight

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evidence that the road had been used for other purposes besides agriculture.

Raine and Richardson, for the defendant, contended—1. If a man has a way for agricultural purposes, which the evidence in this case established beyond contradiction, he has a right to carry lime-stone, or any other produce of the earth, by the same way. Is he to be confined to the naked right of carrying the surface and crops of the earth? Having a general right of way, he may build a house or barn on his field; and if the bowels of his land produce minerals, or other valuable substances, he may dig them up, and carry them by the same way. 2. The defendant has not abandoned his right because he has hired another way for that purpose.

Scarlett, contra.—Where a man has a right to use a road at all times of the year, and for all purposes, if he find a mine in the field (in respect of the occupation of which he claims such road) he may work his mine, or build upon his soil, and use the road without limitation or stint. But the present is a qualified right. The only evidence is, that the head-land has been used for agricultural purposes. Now, the defendant might have a right to use this way to manure his land, or to carry his crops, and for no other purpose. The lord of a manor may have a right to the minerals in the soil, but he cannot break the surface of the earth, and claim a universal right of way over his tenants' (the copyholders') estate, without such copyholders' consent. When the defendant opened a quarry,

he usurped a larger interest in the road than he had heretofore exercised ; a general and universal right of way. But no witness speaks to this general use, in the extent in which it is claimed. It was always qualified by reference to the purposes of agriculture.

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Mr. Baron Wood.—If the defendant is entitled to a general right of road, the plaintiff cannot recover in this action. If the defendant has only a qualified right, the plaintiff has made out his case. The defendant puts his case upon this point ; that, from the right of using the road for agricultural purposes, may be inferred the right of using it for all purposes. In a word, that he may carry lime, as well as corn, over the road in question ; and that he may work his quarry generally, and at all times of the year. This is not the law. A right of road may be qualified and limited ; and the defendant does not make out his case by shewing that he was never obstructed in using the road for purposes of agriculture. He must shew a general and unqualified right, in order to warrant the manner in which he has used this road. There is some evidence, however, of this general use. I shall leave it to the Jury.

Verdict for the plaintiff.

Scarlett, Maude, and Littledale, for the plaintiff.

Raine and Richardson, for the defendant.

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WRIGHT v. HORTON.

1. A person who has qualified for the office of a justice of peace, and acts as such, must have a clear estate of 100*l.* *per annum*, in law, or in equity, for his own use, in possession.

2. In an action against a person for the penalty given by the statute 18 Geo. II. c. 20., for acting as a magistrate without a proper qualification, no notice of action is necessary under the provisions of the 24th Geo. II. c. 44.

THIS was an action of debt upon the statute 18 Geo. II. c. 20, brought against the defendant, to recover a penalty of 100*l.* for acting as a Justice of Peace in the county of *York*, not being duly qualified by law. The clause in the statute is, “No person shall be capable of being, or acting as, a justice of the peace, for any county, who shall not have, in law or equity, for his own use, in possession, a freehold, copyhold, or customary estate for life, or some greater estate, or an estate for some long term of years, determinable upon one or more lives, or for a certain term originally created for twenty-one years or more, in lands, tenements, or hereditaments, in *England* or *Wales*, of the clear yearly value of 100*l.* above what will discharge all incumbrances affecting the same, and all rents and charges payable out of the same; or who shall not be entitled to the immediate reversion, or remainder of lands, leased for one, two, or three lives, or for any term of years determinable on the death of one, two, or three lives, upon reserved rents, of the clear yearly value of 300*l.*”

It appeared that the defendant had taken the benefit of an insolvent act in *January* 1814, subsequent to which time he had repeatedly acted as

a magistrate, without acquiring any new qualification. He had qualified originally in 1802. No notice of this action had been given by the plaintiff to the defendant.

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Richardson and *Williams*, for the defendant, contended, that the plaintiff was bound to prove a notice of action according to the provisions of the statute 24 Geo. II. c. 44. The defendant had acted as a magistrate, and was therefore entitled to the privileges and protection of that office: but

Mr. Baron Wood ruled, that he was not within the act. The question to be tried is, *was* he a magistrate?

They then contended, that if they were enabled to shew when Mr. *Horton* was discharged from prison, that there was a fair probability that his estate would pay his debts, and leave a sufficient surplus to uphold the qualification of a magistrate, the present action would not lie. A legal estate in land was not necessary; an estate in equity was sufficient. They therefore proposed to shew, that there would be a surplus of 100*l. per annum* after paying Mr. *Horton*'s debts.

Mr. Baron Wood.—All the defendant's estate is now vested in the Clerk of the Peace. His legal and equitable rights are equally transferred to his creditors. We cannot take an account here, and declare a surplus in his favour. The defendant

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Verdict for the plaintiff.

Scarlett and Littledale, for the plaintiff.

Richardson and Williams, for the defendant.

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DOE d. SAUNDERS v. COOPER.

EJECTMENT for three messuages in *Hunslet*, in the county of *York*.—In support of the defendant's title, indentures of lease and release were put in ; the lease made between *Ralph Saunders* of the one part, and the defendant and *Elizabeth* his wife of the other part ; and the release made between the said *Ralph Saunders* of the first part, the defendant and *Elizabeth* his wife of the second part, and the defendant and *William Saunders*, of the third part ; *habendum* to the defendant and *William Saunders*, their heirs and assigns. Upon the trusts, and to the uses therein mentioned.

A lease for a year to *A.* and his wife will support a release to *A.* and a third person.

Raine and *C. Milner*, for the lessor of the plaintiff, objected, that the bargain and sale for a year, being to the defendant and *Elizabeth* his wife, and the release to defendant and *William Saunders*, who took as joint-tenants, the releasees had not a possession upon which the release could operate : and that, if it did not operate as a release, it was void ; for it could not take effect as a bargain and sale under the statute ; which must be enrolled, and for a valuable consideration.

Scarlett and *Wales*, *contra*.

Mr. Baron Wood.—The bargain and sale vests the possession for a year in defendant and his wife : one of the releasees therefore has that possession

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which, under the statute of uses, enables him to accept a release ; and I think that this possession is sufficient to entitle him, and the other releasee, *William Saunders*, to take a release to them, as joint-tenants under this deed.

Verdict for the defendant.

The point was saved ; but not afterwards moved.

Raine and *C. Milner*, for the lessor of the plaintiff.

Scarlett, Hardy, and Wailes, for the defendant.

See *Spyve v. Topham*, 3 East 115.

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HEADLAM v. HEDLEY.

TRESPASS for breaking and entering a close, which was a piece of land which the defendant had enclosed between the plaintiff's field and a public road.—Plea, not guilty. The plaintiff was the owner of the close adjoining the *locus in quo*, which was a slip of green sward, across which the road extended. The breadth of the road (including the green sward) was about sixty or seventy yards between the fence of the plaintiff's close and the fence of the occupier of the opposite close. It was in evidence that this green sward had been generally treated as waste land, and as a portion of a neighbouring common, to which, on one extremity, it adjoined. That it had been used as a common for cattle, for a long space of time, by some persons in the next village. There was no evidence that the plaintiff had exercised any act of ownership over it. But he rested his case upon the general presumption of law.

Though the right of the soil in a public highway belongs to the owner of the adjoining closes (when no other proprietor appears) *usque ad flum viæ*; this is only a presumption of law in his favour, when the original dedication of the road cannot be shewn by positive evidence. And if there are circumstances in the case which bring this presumption of property in question, the plaintiff, who claims such road in an action of trespass, must give some other evidence of property beyond the mere presumption of law.

Williams, for the defendant, contended, that the plaintiff could not recover without shewing property in the soil; that the evidence of such pro-

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perty, as far as presumption went, was against him. *Non constat* but the *locus in quo* is part of the waste. Admitting the property in the soil still to continue in the person who dedicates a part of his land to public uses as a highway; in the present case it was not to be presumed that the plaintiff had made any such dedication. 1. From the great extent or breadth of the slip of land intervening between the opposite fences. 2. From the absence of all proof of acts of ownership by the plaintiff over the place in question. 3. That, in one part, it adjoined to an acknowledged common.

Hullock, serjeant, and *Richardson*, *contrà*.—If the defendant can shew a title in some other person, he rebuts the title of the plaintiff; but, in the absence of such proof, the property must be adjudged to the plaintiff upon the ordinary presumptions of law, which are, that the property of the soil in a highway belongs to the owner of the adjoining land, *usque ad filum viæ*. Now, the defendant has enclosed a part between the plaintiff's close and the highway, and is thereby a trespasser. It is for the defendant to shew property in some other person.

BAYLEY, Justice.—It is difficult in many cases to discover the origin of roads. They are sometimes made over waste or common lands, in which case the rights of soil, subject to the public easement, are in the lord of the manor. In other cases they are allotted by the owners of adjoining lands, and then the property in the soil continues in such owners, subject to the rights of general passage.

I think the presumption of the private rights of the plaintiff are negatived by the circumstances of this case ; so far at least as to make it incumbent on him to adduce some evidence of property, or act of ownership, from which property may be inferred. In the absence of such evidence, I shall direct the Jury to presume the *locus in quo* to be common land or waste.

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Nonsuit.

Hullock, serjeant, and *Richardson*, for the plaintiff.

Williams, for the defendant.

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NESHAM and Others v. ARMSTRONG and Others.

In an action on the Riot Act, and upon the 52d G. III. c. 130. against the Hundred; Held, that burning, though specifically mentioned in a clause of the statute, as distinct from a demolishing or pulling down, is included in the latter terms. Q. If a staith, which is a place of deposit for coals, is an erection, building, or engine, within the meaning of the first and second sections of the 52d G. III. c. 130.

THIS was an action against the Hundred for the destruction of a stable, and two staiths, part of a colliery, by a mob, on the 20th of *March*, 1816. The staiths and stable were in the township of *Bishop Wearmouth*. The stable was pulled down; and one of the staiths was burnt. As respected the stable, the declaration was framed upon the 1st Geo. I. st. 2. c. 5.; the Riot Act. In regard to the staiths, which are places for the deposit of coals; the counts were framed upon the 52d Geo. III. c. 130. s. 2. The clause in the latter statute is as follows: "And be it further enacted, that if, after the passing of this Act, any person or persons, (*following the words of the Riot Act,*) shall unlawfully or with force demolish or pull down, &c. any erection and building, or engine, which shall be employed in the carrying on or conducting of any *trade or manufactory*, or any branch or department of any trade or manufactory of goods, &c. of any kind or description whatever; or in which any goods, &c. shall be warehoused or deposited, that then, &c." The clause then proceeds to make such demolishing felony, and gives an action against the Hundred by the parties injured to recover damages.

It appeared that there had been an examination of one of the plaintiffs before a magistrate, in com-

pliance with the provision of the 4th section of the Act, who was the principal manager of the concern.

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Richardson, for the defendants, contended, that as the object of the act was to detect the offenders, all the plaintiffs should have been examined. The act directs that all persons who claim redress shall be sworn and examined.

BAYLEY, Justice.—I think if the plaintiff, who was examined, was the manager, and the only person actively employed, it is sufficient. I will not stop the case on this objection.

Richardson then objected, 1. That the case did not fall within the 52d Geo. III. c. 130. s. 2.; that clause extended only to trades and manufactories, the conductors of which (under the general name of traders and manufacturers) were meant to be protected from the violence of a mob. Warehouses and depositories of goods might require such protection. But, in the present case, the staiths do not fall under the description in the act. They are not erections, buildings, or engines, for the purpose of trade and manufacture. They are parts of a colliery quite distinct from general trade. Neither could the owners of the staiths be called traders in the common use of the word. 2. With respect to the larger staith, it was burned. Burning is not included in the general word demolishing. There is a clause in the act specifically providing redress against burning, which does not mention demolishing.

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BAYLEY, Justice.—I think burning is included in the general word *demolishing*, &c. The act meant to provide against destruction and spoliation; burning is only one of the means. With respect to the objection upon the staith not being within the clause of the act of parliament, I will reserve the point.

Verdict for the plaintiff.

Hullock, serjeant, and *Tindall*, for the plaintiffs.

Richardson, for defendants.

1816.

NORTHUMBERLAND
ASSISES, 56 GEO. III.

REX v. JAMES AKENHEAD.

Aug. 13.

THE prisoner was indicted on the 43d G. III. c. 58. The circumstances were these:—The prosecutor and some other men had got hold of a woman, who, as they conceived, had been using another person ill. They said that she deserved to be ducked in a trough which was near; but it did not appear that such was their intention. The prisoner, who was at some distance at the time, on being informed that they were using the woman ill, exclaimed, “I have got a good knife,” and immediately rushed to the place where she was. He entered among the crowd, and instantly struck the prosecutor on the shoulder with a knife. The prosecutor turned round upon him; a struggle ensued between them; and in that struggle the prosecutor received other wounds. After they had fought for some time, the prisoner dropped the knife, and ran away. The wound upon the prosecutor’s shoulder was about seven inches long, and two deep; and the lap of one of his ears was cut. There was likewise a slight wound on the gland of his neck, and a cut on his left arm. The indictment contained counts,

In an indictment upon the 43d G. III. c. 58. Semble that the words “some other grievous bodily harm,” must be construed to extend to such wounds only as are inflicted upon a vital part in the body.

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1. For an intent to murder, &c. ; and, 2. To maim, disfigure, and disable; 3. And to do some other grievous bodily harm.

Williams, for the prisoner, objected—1. That the first and second counts in the indictment were not supported by the evidence. The only question was upon the third count—Did the prisoner mean to do some “other grievous bodily harm,” to the prosecutor? He submitted that the wounds were not of that kind from which grievous bodily harm could ensue. It was a scuffle in which a knife was used accidentally, without any settled design to “maim, disfigure, or disable,” or to do “other grievous bodily harm” to the prosecutor. 2. The wounds were not inflicted in a part of the body, which could produce such a consequence.

BAYLEY, J. entertained some doubts on the circumstances: the wounds were not in a vital part; and *quære*, whether the injury done was a grievous bodily harm contemplated by the act? Had death ensued, would it have been more than manslaughter? And was not this limit clearly understood throughout the act? His Lordship directed an acquittal, under all the circumstances of the case.

Richardson and *Cookson*, for the prosecutor.

Williams, for the prisoner.

The following is the main provision of the 43d of G. III. c. 58 :—The first section enacts—“ That if any person, &c. shall, either in England or Ireland, wilfully maliciously and unlawfully shoot at any of his Majesty's subjects, or shall wilfully maliciously and unlawfully present point or level any kind of loaded fire-arms at any of his Majesty's subjects, and attempt by drawing a trigger or in any other manner to discharge the same, at or against his or their person, &c.; or shall wilfully maliciously and unlawfully stab or cut any of his Majesty's subjects with intent, by so doing or by means thereof, to murder or rob or to maim, or with intent to do some other grievous bodily harm, to such his Majesty's subject or subjects, disfigure or disable such his Majesty's subject or subjects, or with intent to obstruct resist or prevent the lawful apprehension and detainer of any of his her or their accomplices, for any offences for which he she or they may be respectively liable by law to be apprehended imprisoned or detained, or shall wilfully maliciously and unlawfully administer to or cause to be administered to or taken by any of his Majesty's

subjects any deadly poison or other noxious or destructive substance or thing, with intent such his Majesty's subject or subjects thereby to murder, or thereby to cause and procure the miscarriage of any woman quick with child; that then and in every such case the person or persons so offending, their counsellors, aiders and abettors, knowing of and privy to such offence, shall be and are hereby declared to be felons; and shall suffer death as in cases of felony, without benefit of clergy.

Provided always, that in case it shall appear on the trial of any person or persons indicted for the wilfully maliciously and unlawfully shooting at any of his Majesty's subjects, or for wilfully maliciously and unlawfully presenting pointing or levelling any kind of loaded fire-arms at any of his Majesty's subjects, and attempting by drawing a trigger or in any other manner to discharge the same at or against his or their person or persons, or for wilfully maliciously and unlawfully stabbing or cutting any of his Majesty's subjects with such intent as aforesaid; that such acts of cutting or stabbing were committed under such circumstances as that if death

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had ensued therefrom the same would not have amounted to the crime of murder; that then, and in every such case, the person or persons so indicted shall be deemed and taken to be not guilty of the felonies whereof they shall be so indicted, but be thereof acquitted."

The object of this act, which was much called for, and particularly for the security of police officers, at the time it was passed, was threefold:—

1. To give the same legal quality to the initiative act, which would belong to the act completed; that is to say, to make the attempt, partly executed, murderous, where the act, consummated, would have been murder.

2. To supply a defect in the Coventry Act, by withdrawing the necessary qualification under that Act, *the lying in wait*; a limitation which took all cases out of the reach of that act, in which there was any malicious cutting or stabbing not accompanied by such *lying in wait*.

3. To meet some particular mischiefs at the time when the act was passed; namely, the practice of thieves, at that time become most frequent and atrocious, of cutting and stabbing police officers, em-

ployed in the pursuit or apprehension of them.

The term in the act, "*grievous bodily harm*," looks particularly to this; and thereby, in addition to the taking away the necessity of the circumstance of lying in wait, gives an extent to this act beyond the Coventry Act; as, under the term (*grievous bodily harm*,) the wound need not be given either in a part which by law is a mayhem; nor in a visible part, as under the term "disfigure," in the Coventry Act; nor even in a part regarded as vital. For this act, under its term grievous bodily harm, comprehends stabbing or cutting in the thighs, legs, or any other part; subject only to the limitation, that if death ensue from such act, it must (under the circumstances) amount to the crime of murder; and, therefore, by implication, that there might be a possibility of death ensuing, namely, by the cutting of an artery, or the loss of blood, &c.

4. But as the terms in the act, cutting and stabbing, and the description which follows them, all belong to wounds made by a sharp instrument; so the application of the act under the words wounding, &c.

confined to a wounding by such sharp instrument. Therefore, wounds made by a bludgeon, a poker, or instruments without a point or edge, would not be within this act; *cutting* taking in all edged instruments, and *stabbing* comprehending all instruments with points.

5. The words in the act which direct an acquittal, if the *cutting*, &c. be "*under such circumstances as if death had ensued therefrom, the same would not in law have amounted to murder*," are intended further to define the crime under the statute, by requiring that malice prepense in the initiative, (as it were,) of the action, which, in the completion of it, would have rendered it murder. This limitation is necessary in order to exclude such acts, as in their consummation would only have been manslaughter; and, therefore, in their initiation, are only violent personal assaults.

6. If the means by which the murder, as it were, is thus *commenced*, be totally and obviously inadequate to the effect; the act, it would appear, would have the advantage of this two-fold favourable presumption; first, that murder was not intended, and, therefore, that the act wanted the quality of malice prepense; and, secondly, that it did not fall within any of the terms of the statute, which, under its most general description, requires an act, or an attempt, which *might* be mortal.

7. One of the clauses in this act is directed against *maliciously cutting with an intent to resist lawful apprehension*. But if this cutting take place in an attempt to apprehend the prisoner without a due notification of the warrant or authority by which the person acts, it obviously does not fall within the clause; as it is not a wilful resistance of a lawful apprehension. *Rex v. Ricketts*, 3 Campb. 68.

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CARLISLE
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CLERK v. BLACKSTOCK.

A note beginning "I promise to pay," signed by two parties, is joint and several. A promissory note is signed by A., and subsequently by B., whilst in the hands of the payee, as surety for A.; unless such signature of B. is in virtue of a previous agreement at the time of making the note, it will be void, without an additional stamp.

THIS was an action on a promissory note, brought against the administratrix of *John Blackstock*, deceased. The note was as follows :

" I promise to pay to Mr. *J. Clark*, or order, the sum of 30*l.* with lawful interest for the same, value received.

(Signed) "*Thomas Jackson.*
 "*John Blackstock.*"

It appeared that the note was originally signed by *Jackson*, to whom the money was lent ; and that *Clark* afterwards required some new security from *Jackson*, in consequence of which *Blackstock's* name was added to it as a surety.

Littledale, for the defendant, objected—1. That a note, the tenor of which was, " I promise to pay," signed by two persons, was a joint note, and not a several note.—2. That the note was void for want of an additional stamp. It was a perfect note when signed by *Jackson*; and any subsequent agreement, by which *Blackstock's*

name was annexed to it, created an obligation of a larger extent, and called for a new stamp.

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Williams, contra.—As to the first objection, a note drawn in the words of the present note is joint or several, as the payee may choose to consider it. *March v. Ward*, Peak, N. P. 130.—2. It was not necessary that both parties should sign the note at the same time. Whilst the note was in the hands of the payee, *Blackstock* might sign the note, as a joint promiser, in virtue of a previous agreement.

BAYLEY, J.—I think this note may be considered as a joint and several note. The letter “I” applies to each severally. Lord *Kenyon* has ruled it so. With respect to the other objection, if it were part of the bargain between *Clerk* and *Jackson* that *Blackstock* should sign the note as a principal, he might sign it at any time subsequent to *Jackson’s* signature. But if it was no part of the original bargain, and *Blackstock* came in, upon an after-thought, as a surety merely, the note will not be binding without an additional stamp.

Other evidence was called upon the part of the plaintiff, and he obtained a verdict.

Williams, for the plaintiff.

Littledale, for the defendant.

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LANCASTER
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Sept. 1.

BANCROFT v. HALL.

1. The holder of a bill of exchange, which is returned dishonoured, is not bound to send notice to the drawer by the mail, or first conveyance that sets out from the place where such holder resides. It is sufficient, provided there be no essential delay, if he send notice by a private hand; and although such notice should thereby reach the drawer later in the day than if it had been sent by the mail, he will not on that account be discharged.

2. Notice of the dishonour of a bill of exchange given at the counting-house of a merchant or manufacturer between the hours of six and seven in the evening is not too late.

THIS was an action against the drawer of a bill of exchange who resided at *Liverpool*. The bill was accepted by one *Hind*, payable in *London*, and indorsed by the defendant to the plaintiff. The bill being dishonoured, notice was given to the plaintiff, who lived at *Manchester*, on the 24th of *May*. On that day he sent a letter, by a private hand, to his agent at *Liverpool*, directing him to give *Hall* notice of the acceptor's default. On the 25th, in the afternoon, the agent received the letter, and went about six or seven in the evening to the counting-house of *Hall*; but after knocking at the door, and ringing a bell, no one came to receive a message. The merchants' counting-houses at *Liverpool* do not shut up till eight or nine. The 26th was Sunday; and notice was not, in fact, given till the morning of the 27th.

Scarlett and *Venables*, for the defendant, objected, that the notice was not in time. After the *London* letter reached *Manchester*, a mail set out

next morning to *Liverpool*. The plaintiff should have sent the notice by the mail, which reached *Liverpool* by ten o'clock. If he prefers a private conveyance, or if he attempts to give notice earlier than by law he is bound to do, and fails in giving an effectual notice, he is not therefore exempt from giving proper legal notice. They relied on *Ander-ton v. Beck*, 16 East 248.

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Hullock, serjeant, *contra*.

BAYLEY, Justice.—Notice must be given in time ; but all a man's other business is not to be suspended for the sake of giving the most expeditious notice. He is not bound to write by post as the only conveyance, or to send a letter by the very first channel which offers. He may write to a friend, and send by a private conveyance. Here the notice reaches *Liverpool* on the 25th. No expedition could have brought it earlier. Between six and seven in the evening in that day the witness goes to the defendant's counting-house, and it is shut up. A merchant's counting-house, or residence of trade, is not like a banker's shop, which closes universally at a known hour. It was the defendant's fault that he did not receive notice on the 25th, which he might have done if he had kept his counting-house open till eight or nine, which are the customary hours of closing them at *Liverpool*.

Verdict for the plaintiff.

Hullock, serjeant, and *Evans*, for the plaintiff,

Scarlett and *Venables*, for the defendant.

1875.



M'CLOUGHAN v. CLAYTON and RIDING.


In an action of trespass for false imprisonment, a constable may justify under the general issue, though he acted without a warrant, provided there were a reasonable charge of felony made; although he afterwards discharges the prisoner without taking him before a magistrate; and although it should turn out in fact that no felony was committed. But a private individual, who makes the charge, and puts the constable in motion, cannot justify under the general issue: he must plead the special circumstances, by way of justification, in order that it may be seen whether his suspicions were reasonable.

THIS was an action of assault and false imprisonment. Plea, not guilty, by both defendants.

The plaintiff called at the defendant's (*Riding's*) house, and offered some old clothes to sale. After he left the house, he was pursued by several persons, and charged by *Riding* with having stolen a great coat from his house. *Riding* desired the plaintiff to return with him, and he did so. *Riding* committed no assault, used no force; but, upon the plaintiff's coming back, he sent for *Clayton*, the other defendant, who was a constable, and gave the plaintiff in charge for a felony. The plaintiff was searched by the constable, and dismissed without having been taken before a magistrate. No evidence was given to shew that *Riding* was justified in his suspicions.

Scarlett and *Williams*, for the defendants, made several objections. 1. *Clayton* was entitled to an acquittal: a regular charge of felony was made by *Riding*. *Clayton* could not know whether the charge was groundless or not. He was bound to act; and if he acted, as it was apparent he did act in this case, merely as an officer, and without malice, he was neither subject to an action of trespass, nor to an action on the case. If *Clayton*, there-

fore, originally took up the plaintiff on reasonable grounds of suspicion (grounds which were not to be very narrowly examined); and if, before he took him to a magistrate, he found there was no cause for further detaining him, he had a right to dismiss him, without incurring any responsibility for the general apprehension. *Samuel v. Payne*, Douglas 359. 2. *Riding* was no trespasser. He used no force or coercion: the plaintiff came back voluntarily; and what took place before the constable when the charge was made, will not make him a trespasser; for that was the course of the law, which will justify its own proceedings. *Arrowsmith v. Le Mesurier*, 2 N. Rep. 211. 3. If plaintiff could maintain any action, it should have been an action for a malicious and unfounded charge of felony, and not an action of trespass. *Morgan v. Hughes*, 2 T. R. 351.

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Littledale and Starkie, contrd.—There is a distinction between an arrest by a constable, and an arrest by a private person. The constable may apprehend upon a suspicion of felony without proof of a felony actually committed; but a private person cannot arrest upon bare suspicion. He must obtain a warrant, upon oath, from a magistrate, or prove a felony to have been actually committed at the time of the arrest. 2. It was the duty of *Clayton* to have pursued the charge, and to have carried the plaintiff before a magistrate. He could not apprehend and discharge a man at his own pleasure. 3. But supposing *Clayton* justified, *Riding* cannot couple his defence with *Clayton* under the general issue. He should have either pleaded


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that he acted in aid of the constable by way of justification; or he should have stated the special circumstances of the case, in order that the Court might judge if his suspicions were reasonable. The officer alone has the privilege of including all the circumstances of the case under the general issue.

BAYLEY, Justice.—I do not think *Clayton* was bound at all events to take the plaintiff before a magistrate. If the law gives a constable the right to apprehend on suspicion upon a reasonable charge of felony, it would be an absurdity if (upon finding the suspicion groundless) he was precluded from discharging the prisoner out of his custody—I think *Clayton* is entitled to an acquittal. With respect to *Riding*, he appears to be a trespasser, at least under these pleadings. How far he would have been justified, if he had stated the special circumstances of the case in a plea properly framed, it is not now necessary to determine. I take the law to be this: if a man directs a constable to act, upon a suggestion of felony, he must prove the truth of such suggestion. He is bound to shew probable cause of suspicion. In such case he is a principal, and the constable is only his agent. It is a different case where the individual, who suspects a felony to have been committed, goes before a magistrate to procure a warrant. He then takes an oath; he pledges himself to the truth of that oath, and the law proceeds upon it; and if his charge be false, he is subject to an action for a malicious accusation. But, before a constable, he only makes an assertion. Now, if an action of trespass be

brought against him for this arrest, it is but reasonable that he should be called upon to shew, under a plea properly framed, the circumstances which induced him to make the charge, that the Court may judge if they are reasonable. With respect to the constable the law is clear. If a felony is committed in his presence he is bound to act; if a charge of felony be made, with reasonable circumstances, it is his duty to act; and he is justified by the plea of the general issue upon an action of trespass. But the person who puts him in motion is, *primâ facie*, a trespasser, and must justify the trespass by proving, under a special plea, the truth of the suggestions which he has made, and which induced the constable to act. I think sufficient coercion was used towards the plaintiff: he did not return voluntarily with *Riding*.

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The Jury acquitted *Clayton*, and found a verdict against *Riding*; damages one farthing, and the Judge certified.

Littledale and Starkie, for the plaintiff.

Scarlett and Williams, for the defendants.

The following principle may be laid down as containing in substance the doctrine on this subject. An officer, as a minister of the law, is bound to act on a reasonable charge of crime, so as to bring an accused person before a magis-

trate. The very small evil of such a temporary apprehension, in case of innocence, is infinitely compensated by the advantage to the public peace, in having crimes promptly prevented, and criminals instantly restrained. But there must be

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a direct charge to the officer, or such a reasonable ground of suspicion before his eyes, as may justify him in the eye of the law. He may do this without a warrant. But the mere act of apprehension does not oblige him to continue the detention of the prisoner till brought before a magistrate. The charge may be retracted, or his suspicion may vanish in the way. And as these are the only grounds for the apprehension; so the absence of them is sufficient reason for the release of the accused. His duty is merely that of a zealous and faithful servant of the law.

As respects a person not being an officer, the case of course stands on different principles. If he makes a verbal charge to the officer, and thereby procures the detention of the accused, he acts upon his own responsibility. He must either prove the truth of his allegations, or the sufficiency of the grounds of his suspicion. His act has a two-fold object in point of law, and indeed of reason. Either it is an act of malice, or malicious indifference to the good of another; or it is the defence of himself or the public peace. In the first instance, he would of course be guilty of an injury, and must make the legal satis-

faction. In the second, he has merely performed his duty, or exercised his right; and therefore in law stands acquitted. But in all such arrests, a private person, not an officer, being *prima facie* a trespasser, must put his defence upon the record, in an action of trespass brought against him by the person accused and arrested. The reason of this distinction of law, between an officer and a person not an officer, is founded upon this obvious principle, that the former is an instrument, and of course is not acting under any interest or feeling of his own; but the latter is presumed to be acting more immediately in his own case, and therefore to be more liable to some injurious excess, from private passion, feelings, or interest.

In the case of *Samuel v. Payne* and Others, it was determined, that a peace officer may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed; but that a private individual cannot. Douglas, Rep. 359. In that case Lord Mansfield observed, "that if a man charged another with felony, and required an officer to take him into custody, it would be

most mischievous if the officer were first bound to try, and at his peril exercise his judgment on the truth of his charge. He that makes the charge should alone be answerable."

So, likewise in *Ledwith v. Catchpole*, E. 23 Geo. III. This was an action of trespass and false imprisonment tried before Lord Mansfield at Guildhall. It is a leading case on the subject, and it will not admit of abridgment. The defendant was one of the marshalsmen of the Lord Mayor of London; the Jury found a verdict for the plaintiff, with 20*l.* damages. Upon the motion for a new trial, Lord Mansfield reported the evidence to have been, that *Smith*, who had lost some linens to a large amount, brought *Stevens* to the defendant, who said that one *Maddox* had called a coach and put *Smith's* goods into it at a public house; that the plaintiff put his head into the coach; that afterwards the coach stopped at another house, and plaintiff met it there; that *Smith* suspecting plaintiff to have been concerned in the theft, from the circumstance of his having been twice so seen at the coach, took the defendant on a *Sunday* to the plaintiff for the purpose of having him apprehended; and


that when they came to him, neither *Smith* nor any one else charged the plaintiff with a felony; that *Smith* said, "I have lost some cloth, but I don't say that it was he who stole it; I know nothing of that, but stolen it was." The defendant being asked by the plaintiff what authority he had to arrest him, produced a hanger, and said, "that was his authority." That he then arrested the plaintiff, and took him to the Poultry Compter; from whence he was taken the next day before the sitting Alderman, and discharged.

BULLER, J.—Where a positive charge of felony is made, the party making it is obliged to follow it up with a prosecution, or is himself liable to an action. In such case, the constable is merely ministerial, and bound to take the party up, and carry him before a magistrate; the magistrate must then examine into the matter upon oath, which the constable cannot do.

MANSFIELD, Ld.—The question is, whether a felony has been committed or not. And then the fundamental distinction is, that if a felony has *actually* been committed, a private person may arrest as well as a peace officer; if not, the question always turns upon

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this—Was the arrest *bonâ fide*; was the act done fairly, and in the pursuit of an offender, or by design, or malice and ill will. Many an innocent man has been, and may be, taken up upon suspicion; but the mischief and inconvenience to the public in this point of view are comparatively nothing. It is of great consequence to the police of the country. I think there should be a new trial.

Upon the new trial a verdict was found for the defendant. Caldecot's cases 291.

With respect to an arrest by a private individual, it has been determined, that if *A.* having been robbed, suspect *B.* to be guilty, and take him, and deliver him into the charge of a constable present, *B.*, if innocent, may maintain trespass against *A.* *Stonchouse v. Elliott*, 6 T. R. 315. The general distinction between trespass and case, as respects charges of this nature, and ar-

rests proceeding from such charges, is this—Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only; but where the act of imprisonment by one person, is in consequence of information from another, there an action upon the case is the proper remedy, because the injury sustained is in consequence of the wrongful act of that other. *Morgan v. Hughes*, 2 T. R. 351. In an action of trespass against a private individual, if he justify such arrest on a suspicion of felony, it is necessary that he shew in pleading the causes of suspicion with certainty. He must state the circumstances, upon which he founded his charge, in order that the Court may judge, upon an examination of his plea, if his suspicions were reasonable. *Mure v. Kaye*, 4 Taunt. 34. 2 Inst. 52. Hawk. lib. 2. c. 12. s. 12.

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SITTINGS IN TRINITY TERM, 56 GEO. III. 1816.
AT GUILDHALL

OGLE v. PALESKI.*

July 15.

THE plaintiff was the owner of the brig *Daniel*, and brought this action against the defendant as the owner of the ship *Les Bons Enfans*, for negligence in managing his ship, by which the plaintiff's brig was much damaged.

The trial of the cause had been put off on a former occasion at the instance of the defendant, with a liberty reserved to the plaintiff to examine witnesses on interrogatories. The plaintiff's counsel now proposed to read in evidence the answers of the captain of the *Daniel* to the interrogatories and cross interrogatories exhibited by the plaintiff and defendant respectively. The first answer disclosed, that he was on board the *Daniel* at the time of the accident.

Shepherd, S. G. objected, that the interrogatories could not be read without proving him to have been released previous to his examination.

Where a witness is examined on interrogatories by the plaintiff, and cross interrogatories on the part of the defendant, although it should appear when his evidence is read at the trial, that he was an interested witness, and ought to have been released; his evidence, notwithstanding, may be read, without proving him to have been released previous to such examination. The objection is too late at the trial; and should have been made at the time he was examined.

* This case and the following were omitted in the Reports of Trinity Term, 1816.

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Best, serjeant, *contra*, contended, that as the objection was apparent on his examination, and as the defendant, instead of objecting, had exhibited cross interrogatories, he could not now deprive the plaintiff of the benefit of his testimony: that a release was not necessary absolutely to make him a witness; that it might be waived; and here the defendant had waived it, by not taking the objection when it arose, and when it might have been disposed of by the plaintiff's releasing him.

GIBBS, Ch. J.—I shall receive the evidence; I think the objection ought to have been made in a former stage; and not having been then made when it might have been cured, I think it cannot prevail now.

Best and *Vaughan*, serjeants, and *F. Pollock*, for the plaintiff.

Shepherd, S. G. and *Bosanquet*, serjeant, for the defendant.

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TULLOCH v. BOYD.

THIS was an action on a policy of insurance on a voyage from *London* to *Amsterdam*; in the year 1810.

The evidence, relied on to prove the defendant's ownership, was a letter written by him to the plaintiff, in which he spoke of the damage done to "*his ship*," and of an intention to bring an action against the plaintiff for detaining "*his ship*." The defendant's witnesses proved, that one *Jaber*, of *Rotterdam*, was the owner of the ship; that he appointed the captain; that all the papers (which had been lost,) referred to him as owner; and that the defendant, in fact, was merely the agent of the owner, and had been described as agent in certain bonds of reference which had been prepared between the parties, but not executed.

A letter written by an agent (though not known to be such by the party to whom the letter was written,) speaking of a ship, as *his own ship*, is not conclusive against him in an action on a policy of insurance, in which the question of ownership is raised. He may still prove that he is only an agent, and that others are, in fact, the owners of the vessel.

GIBBS, C. J.—Thought the expressions of the defendant were not conclusive against him, and left it to the Jury to decide whether an agent might not have used the expressions contained in the defendant's letter.

The Jury found a verdict for the defendant.

Best, serjeant, and *F. Pollock*, for plaintiff.

Vaughan, and ———, for defendant.

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It is a general rule that a man's admissions shall be taken most strongly against himself; for every man is supposed to be the best guardian of his own interests, and, in matters of defence, to extend them to the utmost. But courts of law in all cases incline strongly against the doctrine of estoppels, as their direct tendency is to embarrass law in forms, and to exclude an inquiry into the practice of the particular case. A receipt, therefore, has been held not to be conclusive evidence against the person signing it; and he has been permitted to shew that he did not in fact receive the money. *Stratton v. Rastall*, 2 T. R. 366. *The Attorney Ge-*

neral v. Randall, 2 Eq. Cases Abr. 742. So, in an action on a bill of exchange, accepted by the defendant for a valuable consideration, evidence that the plaintiff had been discharged as an insolvent debtor after the bill became due, and had given in a blank schedule, was held not to preclude him from recovering the debt. *Hart v. Newman*, 3 Campb. 13. See likewise *Rex v. Clark*, 8 T. R. 320. But in many cases the declaration of the party is held to be conclusive against him. *Chorley v. Bolcott*, 4 T. R. 317. and 2 Campb. 441. See likewise *Bacon v. Chesney*, Starkie 192, and the note annexed to that case.

CASES

ARGUED AND DETERMINED AT

NISI PRIUS.

IN THE

COURT OF COMMON PLEAS.

SITTINGS AFTER HILARY TERM, AT WESTMINSTER,
57 GEO. III.

PARRY v. HOUSE.

Feb. 14.

THIS was an action of replevin for taking the plaintiff's goods. The defendant made cognizance as bailiff of one *Anne Collard*, and justified the taking of the goods described in the declaration, as a distress for a quarter of a year's rent, in arrear. The plaintiff pleaded in bar *non tenuit modo et formâ*. The defendant proved, that the plaintiff had taken the cottage, in which the distress was levied, of Mrs. *Collard*, at the instantly conveyed to the landlord, and that the actual title is vested in another person. The plea of *nil habuit*, &c. cannot be pleaded, nor can evidence be given which amounts to it.

In an action of replevin, the landlord's title, under which the tenant has gained possession of the premises, cannot be disputed, although the tenant is prepared with evidence to shew, that the premises have been fraudu-

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yearly rent of eighteen pounds ; and that the distress was regularly made for the first quarter. The demise was not in writing ; and the only evidence given was a verbal taking from Mrs. *Collard*.

The counsel for the plaintiff proposed to prove, that Mrs. *Collard* had no interest in the premises ; that they belonged, in fact, to one *Henry Collard*, who had made a fraudulent assignment of them to a person of the name of *Spicer*, who had himself assigned them, without any consideration, to Mrs. *Collard*. They further proposed to prove, that *Collard* had taken the benefit of an insolvent debtors' act ; that the cottage in question was assigned to a trustee under the statute, who was virtually the plaintiff in the present action, and for whom they appeared. They offered to give this evidence in order to defeat the title of Mrs. *Collard*.

Vaughan, serjeant, for the defendant, objected, that the plaintiff was precluded from resisting the title under which he had been let into possession ; that whether Mrs. *Collard* had any title or not, whether she acquired a title fraudulently or honestly, the principle of the law was clear, and founded on the best policy, that the tenant shall not dispute his landlord's title. *Nil habuit in tenementis* cannot be pleaded to an avowry for rent : of course, therefore, the substance of such a plea cannot be given in evidence. Besides, the form of the plea (*non tenuit modo et formā*) shews that the title is admitted, and that the man-

ner of the holding only is disputed. That, to admit evidence of this sort, would be to strip landlords of the protection of the 11 Geo. II. c. 19. s. 22.; the effect of which was to relieve them—not merely in *form*, by allowing them to state title generally, but also in *substance*, by precluding the tenant from disputing his landlord's title in any way. He cited *Sullivan v. Stradling*, 2 Wilson, 208.

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Best, serjeant, for the plaintiff.—It is not true that the tenant is precluded in all cases from disputing his landlord's title. Every plea of eviction amounts to a denial of the landlord's title. The proposition is not universally true. The case of *Sullivan v. Stradling* has been narrowed by modern decisions, *Sapsford v. Fletcher*, 4 Term Rep. 511. *Rogers v. Pitcher*, 1 Marsh. Rep. 541. and *Taylor v. Zamira*, 2 Marsh. Rep. 225. Besides, he was prepared to prove that there was a fraud in the transaction, and that this circumstance distinguished the present case; for it was a rule of law that where fraud was the ground of defence, a person could not shelter himself even under an act of parliament made to confirm his title.

DALLAS, J.—I think I am not at liberty to admit this evidence. The tenant comes here to dispute the landlord's title under which he gained possession; and says, that he is excepted out of the ordinary restriction, (which, I believe, is older than the case of *Sullivan v. Stradling*.) because he can prove a fraud; or, in other words, that

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Mrs. Collard has had the premises fraudulently assigned to her by Spicer. If the premises really belong to the assignees of Henry Collard, they can bring ejectment. That is the proper mode to try the title as between Mrs. Collard and them; but it would be mischievous in the extreme to suffer the tenant to dispute it in an action for rent. This evidence amounts to a plea of *nil habuit in tenementis*. As the plaintiff cannot plead that plea in bar to an avowry, he cannot give the import and effect of it in evidence under any plea.

The defendant had a verdict.

Best, serjeant, and Boman, for the plaintiff.

Vaughan, serjeant, and Noll, for the defendant.

There are few cases of more difficulty than those in which the tenant is permitted to dispute the title of his landlord. It constitutes a case which the law discourages as much as possible; being contrary to the duty, and, in good part, to the confidence which belongs to such a relation. In pursuit of this principle, the law indeed, whilst seeking the protection of the landlord as its main object, has fallen into some slight neglect of the condition of the tenant. Thus, almost all the acts of parlia-

ment on this subject are directed to the exclusive benefit of the landlord. For example, the 3 of William and Mary, by which the landlord is empowered to sell the distress; the stat. of 8 Anne, c. 14. which precludes the sheriff from taking in execution the goods of the tenant without first satisfying the landlord for a year's rent; the acts (4 Geo. II. c. 28. and 11 Geo. II. c. 19.) which give double rent, or double value, on a default of notice to quit, or a holding over. The 11 Geo. II. by

which the landlord is relieved from the obligation, which was essential at common law, of stating his title, and by which act he is permitted to avow, or make cognizance generally; and, lastly, a modern act, 57 Geo. III. c. 52. by which the power of execution upon the premises of the tenant is still further restricted, for the benefit of the landlord. In all these statutes the modern law follows the principle of the ancient.

A disclaimer of the title of the lord by the tenant was considered by the ancient law as a breach of his fealty and homage. Our modern statutes, though they reject the terms, preserve the reason. In an elaborate note in Mr. Serj. Williams's edition of Saunders, Vol. I. p. 347. and Vol. II. p. 284. many of the formal points of replevin and distress are treated with the usual sagacity and exactness of that writer; but he has omitted to distinguish the cases in which the tenant is allowed to dispute his lessor's title. But, before we proceed to an enumeration of them, it may be as well briefly to premise, that they almost all depend upon this principle of manifest equity; that the tenant shall never use as an advantage against his

landlord, what the act and confidence of the landlord have entrusted to him, namely, the possession of the tenure. This, in fact, is the leading principle of the whole law on the subject.

The action of replevin, debt, covenant, &c. and the more modern action of ass and occupation, which are brought by the landlord against the tenant, are not suited to bring into controversy the right of the landlord to the premises, as respects the mere tenant. The question in these actions on the part of the landlord is, demise or no demise; have I let you the land or not? are you my tenant or not? To which the answer on the part of the tenant may be, either a traverse of the tenancy and demise, or no rent in arrear. For, as the landlord may have a right of letting, without a legal title to the freehold; for example, as a *cestui que trust* in possession, where it is necessary to keep the legal and equitable estates apart; so the denial of the title of the landlord would be no answer whatever to his claim of rent upon the demise. In the same manner, one person may have the legal estate, and another the right to the rent, as in the case of mortgagor and mortgagee. In all

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these cases, therefore, with some few exceptions, which will be pointed out, as depending upon other principles, the law will not permit the tenant to dispute the title of his landlord in an action for rent.

It may, indeed, sometimes happen, that the tenant may have taken the land from a landlord holding it upon a bad title, and, under these circumstances, may be compelled to pay his rent twice over; but the mischief of this is only temporary, as the law gives him a remedy in an action against the wrongful taker. In fine, when it is considered how many titles rest solely upon possession, and how frequently, from the loss of title deeds, incumbrances, family settlements, and trusts, it becomes impossible for a landlord to shew, on an emergency, any other title than a long and undisturbed possession, (without the assistance of a court of equity) it will be easy to understand the reason and policy of the law, by which tenants are restricted from abusing a possession, procured by confidence, to the injury of their landlords; whether for the purpose of withholding the payment of their own rent, or of collud-

ing with strangers in a claim upon the land with the advantage of possession on their side. All law, in fact, must proceed upon general principles; and possession is such a strong presumption of right, that the law has necessarily invested it with much of the nature and character of it. In this branch of the law, however, there is some nicety and difficulty.

The following seems the fair result of all the cases:—

1. *Nil habuit in tenementis*, which was the technical mode of denying the landlord's title, was a bad plea to an avowry for rent, at common law. Before the statute 11 Geo. II. c. 19. the defendant in replevin was obliged to set out a title in his avowry; and, if he avowed, and did not set out a title, it was bad. Therefore, where the defendant avowed for rent, setting forth that he was *possessed* of the premises, and the plaintiff replied *nihil habuit in tenementis*, the defendant rejoined *quod satis habuit*, and the plaintiff demurred to this rejoinder; the Court said, that the title should be shewn in the avowry, and was not proper in the rejoinder, 3 Salk. 305. And, per Holt, C. J. 2 Show. 485. in an avowry, where a title is

set out, the plaintiff is bound to traverse some *particular point*. It is clear, therefore, that the plea of *nil habuit*, &c. could have been no answer to an avowry at common law. The stat. 11 Geo. II. was passed with the view of obviating the difficulties which often arose in stating long and intricate titles. It enacts, "That it may be lawful for defendants in replevin to avow or make cognizance generally, that the plaintiff or other tenant of the land, where the distress was made, enjoyed the same under a grant or demise at a certain rent, during the time where in the rent distrained for was incurred, which rent was then and still remains due, without setting forth the grant, tenure, demise, or title, of such landlord, or lessor, &c." This clause has effectually taken away the tenant's right to controvert his landlord's title in replevin. In the same manner, if a lease be by indenture, the lessee and all claiming under him are precluded from pleading *nil habuit in tenementis* to an action brought by the lessor, or his assignee. For the indenture operates as an estoppel. *Palmer v. Exins*, Lord Raym. 1550. 2 Strange, 817. Comyn. 391. *Parker v. Manning*, 7

Term Rep. 539. *Sullivan v. Stradling*, 2 Willson, 208.

2. So, in an action of debt for use and occupation, *nil habuit in tenementis* is a bad plea, and cannot be given in evidence under *nil debet*: because, to maintain this action, the plaintiff must shew a contract with the defendant, which contract is an admission of the plaintiff's possession; and, therefore, in this action the plaintiff cannot recover on the strength of his title, without shewing a taking by the tenant, or an attornment, which is an admission of his title. In the same manner, in an action of assumpsit for use and occupation, *nil habuit in tenementis* is a bad plea; for this action is founded upon a personal contract, in which it is not necessary for the plaintiff to shew any title; and, upon proof of the use and enjoyment of the premises by the defendant, he is entitled to recover a compensation. It is, however, to be observed, that the action for use and occupation is not co-extensive with the action on a contract for rent upon a demise, nor with all the remedies for the recovery of rent. It is merely collateral to these remedies; and if the defendant has, in fact, occupied by the permission of the plaintiff,

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though the plaintiff have, in truth, no title, or a defeasible title, or perhaps an equitable title only, the action may be maintained. 5 T. R. 4. 1 Willson, 314. Bull. N. P. 139. *Nash v. Tatlock*, 2 H. Black. 323. Therefore, in an action for use and occupation by an incumbent against a tenant of the glebe land, who has paid the incumbent rent, the defendant was not suffered to give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title. 5 T. R. 4. And, in a similar action, where the defendant had come in under the plaintiff, Lord *Ellenborough* would not even permit him to shew (what in any other action for rent, or in replevin, may be shewn,) that the plaintiff's title had expired, unless he had solemnly renounced the title at the time, and commenced a fresh holding under another person. 2 Campb. 11. So, a lessee of land in the *Bedford* level was not permitted to object to an action by his landlord, for a breach of covenant, that the lease was void, by the 15 Ch. II. c. 17. for want of being registered. *Hodson v. Sharpe*, 10 East. 351. For it is an universal rule that a tenant shall not be permitted to set up an objection to the title of

his landlord, under whom he held: that this was not a mere technical rule, but one founded in public convenience and good policy.—*Per Lord Ellenborough*. And, in *Frogmorton v. Scott*, 2 East. 467. it was held, that a rector, whose own lease was avoided by non-residence, might recover in ejectment against his own lessee. And, in *Dee v. Smythe*, 4 Maule and Selw. 347. it is said, that when the tenant in possession pays rent to the lessor, and then disclaims, he ought to give back the possession. “It has been often ruled, that neither the tenant, nor any one claiming by him, can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. This, I believe, has been the rule for twenty years. I remember it was so laid down by *Buller, J.* on the western circuit.”—*Per Dampier, Justice*.

Courts of equity concur with the courts of common law in this principle; and, for the reasons upon which the principle itself is founded, they extend it further. In 2 Vesey, jun. 696, Lord *Loughborough*, Chancellor, says, “You cannot act; you cannot come forth to a court of justice, claiming in repugnant rights. Upon that it

is, that a court will not allow a tenant to set up a claim against his own landlord. A man may take a lease of his own estate, but no court of justice will permit him to set up his title against his landlord." See likewise, 11 Vesey, 344.

3. *Nil habuit in tenementis* is, however, a good plea, in debt for rent upon a lease,—not by deed indented; for where there is a demise by deed, a seisin, and a right to make the lease, is the foundation of the action for rent. If the landlord had no title to demise, the tenant has not a *quid pro quo*; and he must pay the rent to the owner of the land. 2 Wils. 208. And to a plea of *nil habuit*, the plaintiff might plead *quod satis habuit*.

The ancient method of declaring in debt for rent is now, however, seldom had recourse to, being superseded by the modern action for use and occupation. This action has many conveniences, inasmuch as the plaintiff is allowed to declare generally, and to produce the contract in evidence in support of his declaration. He is not called upon to state any of the particulars of the demise, or even the place where the premises lie. But this action, it is to be observed, can

only be maintained, where the contract is by parole, or writing, not under seal. If the demise be by deed, the action should be brought upon the deed, and either be debt, or covenant. *Wilkins v. Wingate*, 6 T. R. 62. *King v. Fraser*, 6 East. 348. In this action a landlord, who has rent owing to him, is allowed to recover, not the rent, but an equivalent for the rent, a reasonable compensation for the use and occupation of the premises; and it is premised in his behalf that if the demise be produced against him, (if it be not a deed) it shall not defeat his action, as it would have done before the statute 11 Geo. II. c. 19; but the fixed rent shall be only used as a medium to ascertain the damages. *Nash v. Tatlock*, 2 Hen. Black. 323. We have already shewn that the tenant cannot, in this form of action, dispute the title of his lessor.

4. There are, however, cases in which the tenant is permitted to controvert his landlord's title, in some cases directly, in other cases indirectly. It is, indeed, a general maxim that the tenant shall not dispute his lessor's title in a case where he has originally received possession from him, or has paid him

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rent. But there are exceptions even in this case; for, although receiving, possession from the landlord is the strongest presumption of title, yet even there, the tenant may shew that the landlord's title has ceased; that it has been recovered from him by a judgment at law, and that he has no right to turn him out of possession; or that the lessor has assigned or granted over the reversion. *England v. Slade*, 4 T. R. 682. *Jackson v. Ramsbottom*, 3 Maule and Selw. 316. But the tenant, whilst the lease subsists under which he has been let into possession, will not be permitted to shew that his lessor had no title *at the time of the demise*, though he may shew the expiration of that title. And he may shew that his lessor's title has expired in an action of debt for rent, reserved upon a deed indented, where he would be estopped to plead *nil habuit in tenementis*. *Palmer v. Ekins* Lord Raym. 1552. So, in debt for rent, a tenant who has agreed in writing to hold premises at a certain rent, may allege that the party with whom he made the contract never had any interest in the premises, if such party *never was in possession*; otherwise not, 2 Lord Raym. 746, *per Holt*,

C. J. So where a tenant by mistake, or misrepresentation, pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence, in a plea of *non tenuit modo et formā*, against the supposed landlord, to shew that he is not entitled to the rent. *Rogers v. Pitcher*, 1 Marsh, 541. In this case, however, the plaintiff did not originally receive possession from the avowant. Paying rent is, indeed, a strong presumption; and the presumption of title must be infinitely stronger where the tenant receives possession from the lessor; yet, even in this case, the *continuance* of the lessor's title may be disputed, though the tenant cannot maintain possession of the land, and contend that the landlord had *originally* no right to demise. So, in every plea of eviction, there is an averment that the lessor had not a perfect title when he demised. But the plea of eviction is not sufficient, unless it be added as a fact, that the lessee was in consequence ousted. Cowp. 242.

5. In replevin, however, the tenant may always deny the demise and tenancy, and that any rent was in arrear; concluding each plea to the coun-

try. The latter plea is, indeed, in the nature of the general issue in this action. *Per Lord Mansfield, Warren v. Theobald*, Cowp. 588. It is under this plea, or the plea of *non tenuit modo et formá*, that the tenant may shew that his landlord's title has determined in the manner stated above; but a suspension of the rent by eviction or expulsion must be specially pleaded; and a mere disturbance in the possession, or a trespass, is not sufficient to maintain this plea. There must be an expulsion in fact. Cowp. 242.—So, to an avowry for rent it is a good plea that, before the lessor had any thing in the land, a termor granted an annuity or rent charge, and granted and covenanted that

the grantee might distrain on the premises; that the annuity was in arrear, and that the grantee demanded it, and threatened a distress; and that the plaintiff paid the amount of the rent due, &c. and so nothing in arrear. *Taylor v. Zamira*, 6 Taunt. 524.

So, to an avowry for rent, the tenant may plead payment of a ground rent to the superior landlord; and he may either plead the payment of the landlord's property tax, assessed under the 46th Geo. III. c. 65. s. 74. or he may claim it as a deduction from his rent, giving it in evidence under the plea of *nothing in arrear*. *Clennell v. Read*, 7 Taunt. 50.

But the tenant cannot avail himself of any other set off.

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CASE v. ROBERTS.

An action for money had and received will not lie to recover back a sum paid upon trust, for a specific purpose, unless it be shewn that the trust is closed, and that a balance remains in the hands of the trustee.

THIS was an action for money had and received. The plaintiff had paid fifty pounds into the hands of the defendant, for the purpose of conducting an action for a breach of promise of marriage, brought by a relation of the plaintiff. The plaintiff's counsel proved the payment of the money for this specific purpose; and then put in a letter of the defendant's, written to the plaintiff, in which he gave an account that he had expended the money in a journey to Bristol, for the purposes of the cause. The plaintiff's counsel then contended that the defendant ought not to have gone to Bristol; that it was not necessary for the action; and that he was not authorised to go there. He likewise falsified in some particulars the defendant's account.

Best, serj. and *Gaselee* for the defendant, insisted that the present action could not be maintained. If money is advanced, and the purpose for which it is advanced fails, an action lies to recover it back: but this was in substance a trust; an action of account might lie, or the plaintiff might go into a court of equity; but money had and received could not be maintained. The defendant has furnished an account, and discharged himself by it; if he has been guilty of a breach of trust, the plaintiff must have recourse to another tribunal.

Vaughan, serjeant, *contra*.

BURROUGH, J.—If money is paid into the hands of a trustee for a specific purpose, it cannot be recovered in an action for money had and received, until that specific purpose is shewn to be at an end. The action for money had and received must not be turned into a bill in equity for the purpose of discovery. If the plaintiff shew that the specific purpose has been satisfied; that it has absorbed a certain sum only, and left a balance; such balance (the trust being closed) becomes a clear and liquidated sum for which an action will lie at law. Whilst the matter remains in account, and is charged with the specific trust, the action for money had and received will not lie.

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The cause was afterwards settled.

Vaughan, serjeant, and ———, for plaintiff.

Best, serjeant, and *Gaselee*, for defendant.

Assumpsit lies to recover the balance of a banker's account, however voluminous it may be; and the plaintiff, in such case, is not bound to bring an action of account. *Tomkins v. Wiltshire*, 1 Marsh. 115.

Assumpsit likewise lies, where payment has been made upon a contract which has been put an end to; but if it continue open, the plaintiff can only recover damages for the breach

of it; and then he cannot declare generally, but must state his special contract. *Towers v. Barrett*, 1 T. R. 133. The difference between those cases where the contract continues open, and where it is not so, is this:—If the contract be rescinded, as, where by the terms of it, it is left in the plaintiff's power to rescind it, and he does so; or where the defendant afterwards assents to

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its being rescinded, the plaintiff is entitled to recover back his whole money, and then an action for money had and received will lie. But if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of the contract; and then it is incumbent upon him to state the special terms. *Id. ibid.* But where there is a trust, or honorary employment; a transaction rather of confidence than

contract, which is too vague and indeterminate for the law to raise or imply an assumpsit, the parties are without a remedy in a court of law, whilst the trust remains, and must seek redress in equity. And a contract cannot be rescinded by one party for the default of the other, unless both can be put in *statu quo* as before the contract, 5 East. 549.

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 LENT ASSIZES, 57 GEORGE III.

REED and Another, Assignees of PROCTOR, a Bankrupt, v. AYTON and Others.

TROVER, to recover the value of some flour, which, it was contended, that the defendants had obtained from the bankrupt in fraudulent preference. The bankrupt carried on business at *Yarm*, in the county of *Durham*; and the defendants were flour factors, at *Newcastle*. The bankrupt had purchased 100 sacks of flour of the defendants, and had accepted bills for the price: the flour was shipped for *London* by the bankrupt's direction, and consigned to *Fell* and Co. his agents, who were flour factors. The flour arrived in *London* in *June*, 1813; and the bankrupt, upon the representation of *Fell* and Co. wrote to the defendants, complaining of the quality. A correspondence took place on this subject, but nothing was finally arranged. On the 20th of *June*, *Proctor's* affairs having become embarrassed, he went to *London* for the purpose of arranging them. At this period the defendants had notice

A trader may make a transfer of his goods, on the eve of bankruptcy, to a creditor who compels him so to do by any threat; but a voluntary and fraudulent preference is an act moving from the trader, whereby he elects to favour a particular creditor.

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of the dishonour of a bill which the bankrupt had accepted, and paid to them upon another transaction. They immediately required him either to take it up, or lodge goods in their hands to cover the amount. On the 30th of *June*, the bankrupt rejected the flour, on the score of inferiority; and on the 2d of *July* gave an order on *Fell* and Co. to deliver it to the defendants. *Fell* and Co. had previously sold 35 sacks, for which they accounted to the defendants in money, and re-shipped the residue to their order at *Newcastle*. On the same day the bankrupt wrote to his son at *Yarm*, desiring him to close his shop and warehouse, as he found it impossible to go on. Shortly afterwards a commission issued, founded on an act of bankruptcy alleged to have been committed on the 5th of *July*.

Scarlett and *Littledale*, for the defendants, contended, that this was no fraudulent preference. They relied on *Harman v. Fisher*, Cowp. 123. and *De Tastet v. Carroll*, 1 Starkie, 88.

Hullock, serjeant, for the plaintiffs.—This was a fraudulent preference. In *De Tastet's* case there were circumstances of menace which overcame the free will of the party. But here was no menace; no legal coercion. The bankrupt was merely pressed for a remittance to cover a dishonoured bill. His act was voluntary; and, as part of the flour had been sold, the contract could not be rescinded on the alleged inferiority of the quality. The importunity of a creditor is not

Inconsistent with a fraudulent preference. *Singleton v. Butler*, 2 Bos. and Pull. 283. The test of a fraudulent preference was this: if the act done confer a benefit upon the creditor, and none upon the bankrupt; redceming him from no difficulty or pressure; not thereby enabling him to go on any longer as a solvent man; but leaving him precisely in the same situation as before; such act falls within the meaning of a fraudulent preference. *Thornton v. Hargreaves*, 7 East. 554.

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Wood, Baron.—A creditor, who believes his debtor to be embarrassed, may press him, and obtain a transfer of his property, though the transfer take place on the eve of bankruptcy. The law presumes the transfer to be fraudulent only where it is voluntary. If made under force or terror, the bankrupt cannot be said to yield to favour, but to fear. A voluntary disposition explains itself: it is an act moving from the trader; and a bankrupt cannot be a volunteer, who has no choice but to yield the thing demanded, or to go to prison. In this case, I think, the flour was not to be considered as property simply and absolutely vested in the bankrupt; but the contract was still open. *Proctor* objected to the quality. That objection is still unsettled when an order is given to the factor to return it. The bankrupt, till acceptance, had a right to rescind the contract. In this view of the case it steers clear of the question of fraudulent preference. But, as it may be said that this objection to the quality was to screen a transaction which was in substance a frau-

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duleut preference, I shall leave it to the Jury. I
think it a fair transaction.

Verdict for the defendants.

Hullock, serjeant, and *Wilkinson*, for the plaintiffs.

Scarlett, and *Littledale*, for the defendants.

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HUTCHINSON and Another, Assignees of WARDELL,
a Bankrupt, v. GASCOIGNE, Esq.

TROVER against the sheriff of *Yorkshire*.

The question was, whether *Wardell* was a trader within the meaning of the bankrupt laws. *Wardell* was an attorney principally engaged in conveyancing; but he was frequently employed to put out money upon bond or mortgage, in which cases he obtained a profit upon drawing the securities. It was in evidence, that several persons, not otherwise his clients, had deposited money with him for the express purpose of putting it out; and persons in want of advances often applied to him for loans. He used frequently to place deposits left with him in a banker's hands, in his own name, till he got customers to take it: he then drew the deeds, and charged procuration money. In the course of six years several thousand pounds had been deposited with him for this purpose, which he put out upon securities. No particular securities were pointed out to him, but he chose them himself. Persons often applied to him to borrow money, and others to get them mortgages, bonds, annuities, &c. This was the principal part of his business. He was described in the commission of bankrupt as a money scrivener.

An attorney, who becomes a general depository of the money of his clients, and of other persons, which he invests upon securities, charging, in addition to his fees for preparing the securities, a compensation (no matter by what name) and who unites this occupation with the business of a conveyancer, &c. is a trader within the meaning of the bankrupt laws.

Richardson and *Tindall*, for the defendant, contended, that *Wardell* was not liable to the bank-

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rupt laws. A person, indeed, may unite with the business of an attorney a business which will subject him to bankruptcy. But what was the business of a scrivener? It was a substantive independent business of itself, and not an incident to the business of an attorney. Scriveners are first mentioned in the statute of 21 of James. Bankers were formerly not known in this country; and scriveners were then employed to invest money in private securities. Their business was superseded by bankers, and the facility of investing money in government stock. *Wardell* was not, properly speaking, a scrivener. It is true that he received his clients' money; that he laid it out, and charged a procuration fee; but this was only in cases where the money passed directly from the lender to the borrower. But he did not do this as a means of general business. Recourse was had to him only in the character of an attorney. He was, substantially, a solicitor and conveyancer. Procuration money was a profit incidental to this business. Two things must concur to constitute a scrivener.—1. He must get into his hands the money or securities of other persons upon *trust* and credit. 2. He must follow it as a business and trade *generally*. They cited *Ex Parte Warren*, 2 Sch. and Lef. 414. and *Adams v. Malkin*, 3 Camp. 534.

Scarlett, for the plaintiffs.—This man was a scrivener, and an attorney also. He united the profits of the two trades. It is the business of an attorney to prepare securities for the advance of money, to investigate, to recommend, or to re-

ject them : but it is not his business to charge procuration fees for negotiating loans ; still less is it his business to become a resort for borrowers and lenders, receiving a remuneration from both ; not simply for the deeds he prepares, but for the intercourse he facilitates, and the benefit he confers by pecuniary negotiations. This case was clearly distinguishable from the cases cited. He dwelt particularly upon the expressions of Lord C. J. Gibbs, in the conclusion of his judgment in *Adams v. Malkin*.

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Wood, Baron —I have no doubt upon this case ; there is sufficient evidence that the bankrupt carried on the business of a money scrivener ; and his uniting it with the business of an attorney will not exempt him from the bankrupt laws. If he had received money as a mere channel to convey it from a borrower to a lender, or from one client to another client ; deriving his profit from drawing the securities, and the business of an attorney and a conveyancer in which such a transaction might incidentally engage him, he could not, in propriety, be called a money scrivener. But he is not a channel, but a depository of the money of other persons, who come to him, not simply in his character of an attorney, but as a money agent. He receives their money ; he places it in his banker's hands in his own name. He is trusted with it to lay it out in securities generally, at his own discretion ; and he demands a remuneration for so doing. It does not signify whether he receives it as procuration money, or in any other name or

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shape. It is substantially the business of a scrivener.

Verdict for the plaintiff.

Scarlett, and Hullock, serjeant, and Wilkinson,
for the plaintiffs.

Richardson and Tindall for the defendant.

Commissions of bankruptcy against attornies, which have been frequent of late years, have arisen from an insensible and, apparently, an unintentional transition of the profession and business of an attorney, into the lucrative receiving and putting out of the money of his clients, which was formerly the exclusive occupation of a scrivener. As an attorney, it is totally unnecessary to say, that no man is subject to the bankrupt laws, as he neither buys nor sells, nor puts his own or other person's property to risk. It is a profession, and not a trade. This, of itself, is a sufficient, and indeed the sole, distinction.

But if to the business of an attorney he voluntarily adds that of a lucrative taking, and letting out of the money of other persons, he manifestly superinduces the trade of a scrivener. And as a scrivener, he becomes, not only by the

express words of the statute of 21 James I. cap. 19, but by the whole scope and construction of the bankrupt laws, a trader, and of course subject to bankruptcy.

It seems an error, however, to confound the description of a banker and a scrivener, and to consider the scrivener as having only, in earlier times, preceded the banker. The fact seems to be, that the scrivener more nearly resembles the modern stock-broker than the banker. The office of the scrivener was to receive and employ his customer's money to the best advantage, for which he obtained a commission from borrower and lender. If he united, as probably some did, the profession of an attorney, he made an additional profit by the preparing of the securities. It is unnecessary to insist that such a description of business is immediately within the aim and

intent of the bankrupt laws. The scrivener was, however, (upon some occasions only,) a banker. The modern banker was the ancient goldsmith. The scrivener laid out the money entrusted to him for his customers. The banker receives, and lays it out for himself. This is the distinction.

The scrivener has been superseded in modern times partially by the stock-broker; and, in some degree, though slightly, by the banker. The quantity of public stock, and government securities, afford every one an easy opportunity of investing property; and there is no longer any necessity of seeking out agents to find a profitable employment for money. But it is not to be inferred from any of the cases that an attorney becomes a scrivener merely because he receives money, and by the direction of his clients, invests it in securities; charging his legal fees on the deeds, and a professional compensation for his labours. The distinction is, he must not make the receiving and letting out of money his *business* and occupation; nor must he be in the *habit* of taking (what would certainly be regarded as the peculiar profit of the scrivener) a compensation for such put-

ting out, beyond his professional fees. He must not, in fact, take either procuration money or commission; (*as such*) for this would be trading. In a word, in all his transactions the character of an attorney must be uppermost; and when he appears in the function of putting out the money of his employers, such putting out must be *incidental* only and collateral to the business of an attorney. In the same manner, and upon the same principle as a farmer, or landholder, having a brickfield, or a fishery, upon his estate, may make up the bricks, or salt the fish, of that field or fishery, because forming an incidental part of his general produce; and because such an operation is necessary to its sale. This, in fact, contains the whole principle, both of the law, and of its distinctions.

But it becomes necessary to enter more extensively into this question, as a practice is now becoming very general of suing out commissions of bankruptcy against attorneys as money scriveners; a practice which, it is hoped, the courts will discourage to the utmost limits of the law; as, upon one part, it tends to degrade a liberal profession; and, upon the other, it appears to be an un-

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worthy artifice to extend the rigour of a law, almost penal, to cases never within its contemplation. The 21 Jac. I. c. 19. was the first act which introduced scriveners as subject to the bankrupt laws. The words are, a person "that uses the trade and profession of a scrivener, receiving other men's monies or estates into his trust or custody." This is a legislative exposition of what was meant by the term scrivener. In this statute the business of a scrivener is described as a trade or profession; that is, a profession so connected with trading, that the legislature was doubtful by what term to describe it. It is to be lamented that the business of a scrivener, technically as such, having totally passed away, we are left to collect what it formerly was rather from the loose description of those times, than from any thing we see amongst ourselves. It appears, however, from Stowe, that a company of scriveners was incorporated in London, in the reign of James I. Book 5. p. 200.

In 2 Eq. Cases Abr. 707, some notion may be deduced of the proper occupation of a scrivener from the cases there reported: see likewise Viner's Abridgment, Vol. 19. p. 289. It appears from these cases,

that he was neither the attorney, nor the banker; he did not prosecute suits and actions; he did not prepare conveyancing as a matter of general business; nor did he, like the banker, become a general depository of the money of another, the mere agent of an account current. He was employed to find out securities for the profitable investment of money; his discretion was trusted on these occasions; property was deposited with him; and the money of his several customers was probably allowed to accumulate in his hands, whilst he was occupied in such search. It appears likewise, from the old cases, that, like our factors and brokers, he became, upon some occasions, guarantee for his own transactions, upon the manifest mercantile reason of the parties being better known to him than they were to each other. Here, therefore, were two functions, which at once constituted him a trader, and brought him within the compass of the bankrupt laws; and the absence of which, in the character of an attorney, affords the main, and indeed the sole distinction between the two. The getting the monies and estates of other men into his possession; being trusted with

them; dealing with them upon his own discretion in the course of trade; and this, not incidentally, but as the general and discriminating habit of his occupation.

But these principles will better appear by subjoining the cases, which must necessarily be done at some length, which the importance of the enquiry must excuse. In *Ex parte Burchall*, 1 Atk. 141, Lord Hardwicke says, "a scrivener comes within the meaning of the words bankers, brokers, and factors, used in 5 Geo. II." In *Ex parte Wilson*, 1 Atk. 217, the same authority says, "a scrivener does not keep an open shop; and yet, as he receives money belonging to other people, and places it out on securities, which is the business of a scrivener, he may become a bankrupt." In *Willett v. Chambers*, Cowper 814, Lord Mansfield, speaking of a scrivener, says, that "he understands a scrivener to be a person who was employed to lend out money for others on security, and got procuration money in the transaction." In *Hampson v. Harrison*, 2 Esp. 1. N. P. 555, per Lord Kenyon, "It is impossible to suppose that every man who receives the money of another into his possession, and makes

some kind of use of it, thereby becomes a scrivener. Such a doctrine would subject parties to the bankrupt laws to whom the law never intended them to extend. It would extend to the steward and receiver of landed property; and, in fact, to every person in business. When the statute passed, the business of a scrivener was well understood; the statute had those particular persons in view who, *eo nomine*, carried on the business of a scrivener. The acts relied on to constitute a scrivener must apply to persons who used to act as they did, not where a person receives and pays money as the bankrupt in the present case has done." His lordship, therefore, determined, that a clerk in the custom-house, who took debentures for merchants, and had a commission allowed on the receipt of them, and employed the money which he so received in discounting bills for his own use, was not a scrivener within the meaning of the bankrupt laws.

The next case of importance is the case of *Ex parte Warren*, 2 Schoal. and Lefroy, 414. In that case it was decided, that a scrivener, within the meaning of the bankrupt laws, was a person having money put into his hands to lay out on

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security; and laying it out accordingly in the ordinary course of his dealing, and making profit by taking a commission: but that a practising attorney, acting in the common and ordinary business of his profession, did not, by occasional negotiations of loans of money, for which he received procuration fees, thereby become a scrivener within the meaning of the bankrupt laws. In this case, Lord C. J. *Downes*, who assisted Lord *Redesdale*, observes, that he understood a scrivener "to be a person who is in the habit of receiving money from his employers for the purpose of laying it out in securities for them." The Lord Chancellor, in a very elaborate judgment, says, "This distinction may be fairly drawn in every case, viz. whether the business transacted was incidental to the character of an attorney or solicitor, or distinct from it. The statute of 21 Jac. I. c. 19. uses the words *trade or profession* of a scrivener. The old word *chevzance* being out of use, it had become doubtful, whether a scrivener was included in the act; and therefore (it should seem) these words were introduced. In this statute, the business of a scrivener is described as a trade or profession. When we look

to what has been the construction of this act in England, it is pretty clear, particularly from expressions attributed to Lord *Hardwicke*, what persons were within the description of a scrivener. Under the old act were included persons who really did carry on a species of trade, much the same as that of bankers or factors; that is, they took property into their hands with which they were entrusted; taking profit by way of commission; but, generally, taking the commission only from the person who borrowed the money, and not from the persons whose money was lent. In process of time the character of scriveners became uncommon, because dealings in money had increased to such a degree, that new descriptions of persons arose who transacted the business, which had been before transacted by scriveners; persons who acted as bankers; and persons who acted as brokers: the former receiving and paying money as directed by their principal; the latter, negotiating transactions of borrowing and lending. It was thought necessary to make these persons liable to the bankrupt laws by express words; and, accordingly, this was done by 5 Geo. II. A factor did not come within the


description of the former laws ; because, though he bought and sold, it was not for himself, but for others : and, with respect to factors, brokers, and bankers, the policy seems to have been this ; that as, in the nature of their dealing, they did, in a certain way of trade, get other men's money into their hands, and might deal fraudulently or unfortunately with it, they became proper objects of the bankrupt laws. This was exactly the reason for which a scrivener was considered as a proper object of those laws by the statute of James the First ; because he got into his hands the money of other men in the ordinary course of his dealing. But it is not merely handling other men's money which makes a man a proper object of these laws : he must get that money into his hands in a course of trading, whether that trading be for *his* benefit only, or for other men's also, as in the case of a factor. It is not to be implied that every attorney who transacted a loan of money, and took money for transacting the loan, was subject to the bankrupt laws. Lord *Kenyon*, in the case of *Harrison v. Harrison*, 2 Esp. N. P. 555, determines, that the mere receiving of other men's mo-

ney, charging a commission on the receipt, and employing the money whilst in his hands, for his own benefit, did not make a man a bankrupt. I think, therefore, it must now be pretty well understood, that an attorney, or solicitor, acting in his common and ordinary business, and merely taking procuration money on a loan, does not thereby become a scrivener liable to the bankrupt laws. But Mr. *Warren* is now represented to be standing as a person in a different situation ; as a person *generally* known as dealing in a different character ; as dealing for loans of money ; having money put into his hands to lay out upon securities ; and laying it out accordingly in the ordinary course of the trade of a scrivener, within the meaning of the statute of James the First. *If this case can be established the commission must stand.* An issue was directed to a court of law, and *Warren* was found not to be a broker or scrivener within the meaning of the bankrupt laws.

The case next in order is *Ex parte Malkin*, which was a petition to the Lord Chancellor *Eldon* (June 1813) to supersede a commission against one *Adams*, who was described in the commission as a scrive-

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1817.  The evidence to support the trading was principally produced from his own books and papers; and, so far from proving that he was a scrivener, it merely proved that he was a practising attorney. The acts relied upon to prove *Adams* a scrivener were transactions in which he had been concerned for several clients from 1806 to 1811, purchasing and selling estates; receiving and accounting for the interest of the money whilst in his hands; negotiating loans on mortgage and annuity; receiving bills and other property; investing part in security; and retaining part to answer occasional drafts. In support of the petition, the cases above cited, of *Ex parte Warren*, *Willett v. Chambers*, and *Hamson v. Harrison*, were relied upon. Against the petition it was contended, that the sound distinction had been taken by Lord *Mansfield*, in the case in Cowper, 814.—“That an attorney who, in addition to the profit derived from preparing the instrument in money transactions, takes also commission or procuration money, may be a scrivener.” The Lord Chancellor, in giving judgment, thus expresses himself, “The notion amongst old conveyancers was, that a scri-

vener, who drew the deeds, could make no charge for that; that his procuration included all. In the annuity act the legislature, speaking of an attorney taking more than 10*s.* *per cent.* for procuring a loan, did not conceive that, by *that* description, they reached a scrivener; as there is a distinct description of him, (*vide* the 17th Geo. III. c. 26.) I have certainly heard a scrivener described as a person taking a procuration for procuring money, and that included all. He could not unite the two professions, and make a double charge. The practice of a scrivener charging procuration money arose upon this; that his charge as an attorney was illegal, unless he *was* an attorney. Lord *Kenyon*—I remember, said, that if an attorney, engaged in the affairs of a family, and laying out their money in mortgages, was employed only in conveyancing, his bill could not be taxed, as if he had carried on suits; and attorneys, instead of making out bills for conveyancing, charged procuration, in order to avoid taxation. My own notion upon the subject is, that if an attorney takes procuration for loans as well as his fees as an attorney, acting in the former capacity to such an extent as

to afford evidence of his intention *always to do so*, he may be the object of a commission as a scrivener. It can never be represented that every attorney is a scrivener. The professions are very different: in fact, the same person may be both; but then it must be ascertained in which transaction he is the one or the other; and I very much doubt whether the policy of the law would permit him to be both in the same transaction," 2 Vesey and Beames, 31. Issues were directed to try, first, whether *Adams* was a scrivener; secondly, whether he was a broker. At the trial of the issue in the court of Common Pleas, *vide* 3 Camp. 534, some evidence was brought forward which had not been presented to the Chancellor upon the petition. It appeared that *Adams*, in all the transaction, relied upon to prove him a scrivener, had acted in the ordinary business of an attorney; that the attorney was always, and on every occasion, predominant; that some of his relations, indeed, having no banker of their own, had deposited money and bills with him to be deposited with *his* banker. In the negotiation for the sale of estates, of which there were only three instances,

he had received rent, and assisted in procuring the loan of money; but then he had drawn the mortgage deeds as an attorney. It did not, however, appear that he was ever intrusted with the money of any persons to lay out for them at *his discretion*; although he was sometimes the hand employed by one party to deliver over the money to another, when it was advanced and when it was repaid. He was not, however, in any comprehensive meaning, the depository of the money of his clients; nor was it proved, in any one instance, that he had the money of other men in his general trust and custody. He was employed principally in negotiating pecuniary transactions; as a channel from borrower to lender, and not as a depository.

Lord Chief Justice *Gibbs*, who tried the issues, thus expresses himself in the report:—"The person, to be considered a scrivener, must carry on the trade or profession: it must be an occupation to which he resorts in order to get his living, To be a scrivener within the meaning of the statute, he must likewise, in the course of this occupation, receive other men's monies into his trust or cus-

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today. It appears from the old cases that, before bankers and brokers were so easy to be found, the scrivener was the person with whom people were accustomed to deposit their money, in order that he might lay it out for them when he should find a proper opportunity. The scrivener in the mean time had the use of it, and could not be questioned for the profit he made of it till he laid it out: he was trusted as a banker. It was not a specific sum which in monies numbered he was to keep in his chest; he gave credit for it to the party, who had sufficient confidence in him that he would lay it out to advantage, so soon as an opportunity offered. At the present day, the banker occupies one department of the business of the scrivener, by being the depository of the money; and the attorney the other by drawing the securities. The banker would not be an attorney, though he were occasionally to fill up bonds for his customers; nor does the attorney become a scrivener, though, on particular occasions, he incidentally has the money of his clients to lay out for them. In order to make a man a money scrivener, he must carry on the business

of being trusted with other people's monies to lay out for them as occasion offers. It is not being sent with the money of his client, or receiving it from the person with whom his client may have previously contracted, that will make an attorney a money scrivener. In that part of the transaction he is no more than a person employed to fetch and carry. Having negotiated the loan, and drawn the deeds, the happening to receive and pay the money is incidental to his business of an attorney. Nor if, on one or two occasions, money were deposited with him to lay out, would that constitute him a money scrivener. He must be carrying on generally the business of a money scrivener. That must be part of his known occupation. Though an attorney may have incidentally acted as a scrivener, that is not sufficient: though money may have been deposited with him, for which he was afterwards to seek a borrower, a few insulated instances of that sort occurring in the course of his business as an attorney would not bring him within the operation of the bankrupt laws; for that would not be 'using the trade or profession of a scrivener, receiving other men's

monies or estates into his trust or custody.'” — Addressing himself then to the parts of the case in evidence, his Lordship proceeds to observe upon a negociation between one *Green* and *Adams*—“If *Green* had, as *Adams* represented, deposited the 100*l.* with him till (*Adams*) could find a borrower; *pro hac vice* he would have been a money scrivener; and a course of dealing of that description would render him liable to the bankrupt laws, though one or two instances only would not have this effect.” And again, in another place, he observes, “All (*Adams's*) charges to his employers are the common and usual charges of an attorney. He charges for his trouble, whether his labours have been attended with a favourable or unfavourable result. However, I do not put the case upon that ground; for if he had even charged procuration

money or commission, this, in my opinion, would not have made him a scrivener, unless he had been *entrusted* with money, as money scriveners were accustomed to be when the statute passed. And I am inclined to think if he had been entrusted with money, as money scriveners formerly were, he would still have been within the operation of the bankrupt laws, though he had not received procuration money or commission, and had made the usual charges for drawing the securities. The effectual point to consider is, whether he had other men's monies or estates in his trust or custody as a scrivener.” The Jury found that *Adams* was neither scrivener nor broker.

N. B. See further on this subject, *Hurd v. Brydges*, *post*. Sittings in the Common Pleas after Mich. Term, 1817.

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HUGHES v. MORLEY.

1. Where the defendant pleads his certificate in bar, the plaintiff is at liberty to give evidence of gaming at *Nisi Prius*, in order to vitiate the certificate.

The 12th and 7th section of the 5 Geo. II. c. 30. are to be construed as if they were incorporated.

2. But the plaintiff must confine his evidence to one act, and elect whether he will give evidence of one loss, amounting to 5*l.*, or of several losses, amounting to 100*l.*

THIS was an action to recover the amount of an attorney's bill for business done for the defendant, previous to *June*, 1815. The defendant, who in that month had become bankrupt, and subsequently obtained his certificate, pleaded his bankruptcy generally. For the purpose of avoiding the certificate, the plaintiff proposed to prove that the defendant had lost five pounds in one day, or to the amount of 100*l.* at various times within the year, prior to the issuing of the commission.

Scarlett, for the defendant, contended, that the plaintiff was not at liberty to prove gaming as a bar of the certificate under the 5 Geo. II. c. 30. The bankrupt had, by that statute, the privilege of pleading his certificate generally, concluding his plea to the country. And it was provided, that a verdict should thereupon pass for the bankrupt, "unless the plaintiff in such action could prove the certificate obtained unfairly, and by fraud ; or unless he could make appear any concealment by such

bankrupt to the value of 10*l*." He insisted, therefore, that no other objections could be taken to the certificate at *Nisi Prius* except payment of money for obtaining the certificate, or a concealment of property. The clause on which the plaintiff rested his objection was the 12th clause. But to take advantage of this clause for the purpose of vitiating the certificate, he ought to have petitioned the Chancellor against the allowance. It was not to be discussed at the trial.

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Littledale, contra.

BAYLEY, Justice, said, that he would reserve the point, and the plaintiff proceeded in his case.

A witness was called, who swore that the defendant had lost, within one day in the year, at the house of the witness, 5*l*. at cards. The plaintiff's counsel then called another witness, and proposed to prove other acts of gaming; but the defendant's counsel objected, that the plaintiff must confine himself to one act, in the same manner as if he had replied to a special plea of bankruptcy.

BAYLEY, Justice—I am of opinion that he must. I shall confine the plaintiff to evidence of one act; and he must elect whether he will give evidence of one loss of 5*l*. or of several losses amounting altogether to 100*l*.

The Jury disbelieved the plaintiff's witness, and found a verdict for the defendant.

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Littledale and Williams for the plaintiff.

Scarlett, Venables, and Parke for the defendant.

In Easter term the plaintiff obtained a rule *Nisi* for a new trial; and cause was shewn at Serjeants' Inn, in Trinity vacation, 1817.

Scarlett and Parke, for the defendant.—The point, they said, was wholly new. That the objection of gaming, when taken, had always been by petition to the Chancellor to stay the certificate. And that it was not competent to raise this objection at *Nisi Prius*, where the defendant could not be prepared to answer it. They relied on *Ex Parte Mason*, 6 Ves. 614. *Whitmarsh*, 288. and *Ex Parte Kennett*, 1 Rose, 331.

Topping and Littledale, *contra*.

Per Curiam.—The 7th section of the 5 Geo. II. c. 30. gives the plaintiff the general plea of bankruptcy. But it

provides, that this plea shall not avail him in two instances. The 12th section, upon which the objection is raised, then enacts, that nothing in this act shall be construed to give any benefit or advantage to the bankrupt, "who hath, or shall have lost in any one day, the sum or value of 5*l.*, &c." It is manifest, therefore, how we must understand the act. We must incorporate the 12th section with the 7th, and construe them together. The practice has been uniform to admit such evidence at *Nisi Prius*, and we think the practice correct. The Court (upon the merits of the case) made absolute the rule for a new trial, thinking that there was not sufficient reason for discrediting the account of the gambling transaction given by the plaintiff's witness.

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SITTINGS AT WESTMINSTER, IN EASTER TERM,
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TAYLOR v. HOOMAN.


TRESPASS, for breaking and entering the plaintiff's house, situated in the parish of *Clerkenwell*.—Plea, Not Guilty.

The trespass was proved to have been committed in the parish of *St. James's, Clerkenwell*.

Vaughan, serjeant, and *Comyn*, for the defendant, objected, that as this was a local action, and there were two independent parishes in *Clerkenwell*, *St. John's*, and *St. James's*, the plaintiff had failed in his proof. *Vaughan* mentioned a MS. case, the name of which he did not recollect, which was tried in this Court, in 1808 ; where, in trespass for breaking and entering a dwelling-house, it was described in the declaration to be in the parish of *Chelsea*, and proved to be in *St. Luke's, Chelsea*, which was held to be a fatal variance.

In trespass, where there are two independent parishes in one district, as *St. John's* and *St. James's*, in *Clerkenwell*, if the trespass be stated to have been committed in *Clerkenwell*, generally, and be proved to have been committed in the parish of *St. James's*, it is a fatal variance.

Best, serjeant, *contra*.—The amount of the objection is a variance between the allegation in the declaration and the proof. This would be a fatal objection, if there were no such parish

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as *Clerkenwell*, or if it were proved that the dwelling-house was in another parish. But it is situate in *Clerkenwell*, which is a district containing two parishes. *Clerkenwell* may be considered as a *genus*, with reference to its two divisions; and there was no necessity for any further particularity.

GIBBS, C. J.—This is a variance, and I shall nonsuit. I rely on the case of *Doe v. Salter*, 13 East. 9. That was ejectment for premises which were laid to be in *Farnham*, and proved to be in *Farnham Royal*. It was contended, that the variance was fatal. Mr. Justice *Heath*, before whom the case was tried at *Nisi Prius*, thought it was not material, unless the defendant could prove there were two *Farnhams*. The Court of King's Bench afterwards held the direction of the learned Judge right; alleging, as their reason, "that there was no *other Farnham*." The defendant has proved here that there are two *Clerkenwell's*. There is, therefore, an uncertainty.

Best, serjeant, and *Andrews*, for the plaintiff.

Vaughan, serjeant, and *Comyn* for the defendant.

In trespass, ejectment, and penal actions, greater certainty of local description is requisite than in actions founded on contract. The reason is obvious: as respects real property, or injuries done to it, the venue is material; and,

therefore, the description of place is not formal, but of the substance of the wrong alleged, whilst actions on contracts are transitory. In assumpsit for use and occupation, for example, it is not necessary to state in what parish

the premises are situated; and, if the parish be described by a wrong name, it is immaterial; at least, if it be described by a name generally known, and which could not mislead the defendant. 1 Taunt. 570. The reason is, because this action is brought on the personal contract. But in replevin, which is a local action, the parish is essential; and a variance would be fatal. So, in an action on the case for a nuisance in erecting a weir, if it be described in the declaration to be at *H.*, and be proved to be at a lower part of the same water called *T.*, the variance is fatal. *Shew v. Wrigley*, 2 East. 500. And in an action for non-residence, which is a penal action, where the parish was styled in the declaration *St. Ethelburgh*, and the real name appeared in evidence to be *St. Ethelburga*, it was held to be a fatal variance.

Wilson v. Gilbert, 2 B. and P. 281. But, in an action on the case for setting up a degrading mark before the plaintiff's dwelling-house, in order to stigmatize him as the keeper of a brothel (such action not being local in its nature) where the declaration, after describing the house to be situate in a certain street, called *A.*, in the parish of *O.* (there being no such parish) afterwards stated the nuisance to be erected and placed in the *parish aforesaid*, the Court said they would ascribe it to *venue*, and not to local description; and the place need not be proved as laid. *Jefferies v. Duncombe*, 11 East. 226. So in a penal action, if a parish be described by its popular and well known name, it is sufficient, though it be not the name by which it was consecrated. 3 Taunt. 127.

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WAKEFIELD v. GALL.

The name of a witness, though not in the original subpoena, may be inserted therein at any time, if she have been regularly served with a copy.

ASSUMPSIT.—The plaintiff's counsel called one *Mary Boyce*, who did not appear; and then proposed to call her on her subpoena. On producing the subpoena, for the purpose of having the witness called, her name did not appear to be included in it; but there were the names of other witnesses. The plaintiff's attorney stated, that he had served *Mary Boyce* with a copy of the subpoena, in *Westminster Hall*, in the morning. At the time of service he inserted her name in the copy; and had intended to insert it in the original, but had forgotten it. He proposed to insert it now.

Best, serjeant, objected. The subpoena served does not correspond with the original, which is the ground of the obligation upon the witness to attend. The penalty for non-attendance is exceedingly severe. It may, at the pleasure of the party, be treated either as a contempt of the authority of the Court, or become the ground of a civil action for damages. Is it to be permitted to the attorney at this moment, by an *ex post facto* insertion of the name of the witness, to fabricate the materials of a contempt? The copy with which *Mary Boyce* was served could impose no duty upon her to attend, because it does not correspond with the original. It was so much waste paper; and it is too late to ree-

tify the error after the alleged default has been made.

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GIBBS, C. J.—These *subpenas* are delivered out in blank from the office. The attorney, who obtains them for the purposes of the action, may insert what names he pleases in them. *Mary Boyce* has been served with a copy in which her name was inserted ; and I think it may be inserted in the original now ; *valeat quantum*. If further proceedings take place the question may be discussed then.

Vaughan, serjeant, and *Adolphus*, for plaintiff.

Best, serjeant, for defendant.

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EDGAR v. HUNTER.

Persons required to take out certificates under the 55th of Geo. III. c. 184 (schedule A. part I. title Certificate) are only persons being members of the four Inns of Court, &c.

ACTION for work and labour. The plaintiff was a medical agent, and had been employed by the defendant in a negotiation for the purchase of a medical business. A gentleman was found desirous to dispose of his practice; and the plaintiff drew up an agreement between the defendant and this person. The contract was not executed, and the plaintiff now sued the defendant for a compensation:—First, for preparing and drawing the agreement. Secondly, for work and labour generally. The plaintiff had no licence under any act of parliament.

Best, serjeant, for the defendant, contended, that as the plaintiff charged for the agreement specifically, and as the work and labour were to be considered as subordinate only to the agreement, he ought to shew that he had a certificate. He must either produce a certificate as a conveyancer, or as a special pleader. This was not an agreement for the sale of goods; but strictly a professional instrument. He relied on the 55th of Geo. III. c. 184. The object of the act of parliament was to prevent persons from preparing legal instruments who had not the proper professional qualifications. If the plaintiff was authorised to draw up an agreement of this kind—why not a mortgage, or a marriage settlement?

Copley, serjeant, for the plaintiff.—A certificate is not necessary. There is no act of parliament that requires it. The statute referred to was not meant to prevent parties from negotiating a sale of property. If this construction prevailed, no man could draw up a contract for the sale of his own estate, without taking out a licence as a conveyancer, a special pleader, or an attorney. But, admitting that the plaintiff was liable for an infringement of the stamp laws in having drawn up an agreement without a certificate, the agreement itself was not therefore invalid. He relied on the 44th Geo. III. c. 98, schedule A. title Special Exceptions: under which was a clause exempting “Persons preparing or drawing agreements under hand only, or wills.” He cited likewise schedule A. Part 1. of the 55th of Geo. III. c. 184. “Certificate to be taken out yearly, by every person, being a member of one of the four Inns of Court in England, who, in the character of conveyancer, special pleader, draftsman in equity, or otherwise, shall, for, and in expectation of any fee, gain or reward, draw or prepare any conveyance of, or deed or instrument relating to, any estate or property, real or personal, or any other deed or contract whatsoever, or any pleadings or proceedings in any court of law or equity, &c.

GIBBS, C. J. This cannot with any reason be called a proceeding in law or equity. The act relied on, is the 55th of Geo. III. c. 184. The certificate, under that act, is only required to be taken out by persons being “Members of Inns of

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Court," who shall transact certain business. This is the plain and obvious construction. It does not apply to persons not being members of Inns of Court. There is no previous clause in the statute, enacting that none but members of court shall draw such agreements; and this clause only applies to members of Inns of Court, who shall prepare such contracts. But supposing the plaintiff obliged to take out a certificate, I am inclined to think with my brother *Copley*, that the agreement would not therefore be invalid, though the plaintiff might subject himself to a penalty.

Verdict for 20*l*.

Copley, serjeant, and *Robinson*, for the plaintiff.

Best, serjeant, and *Casberd*, for defendant.

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HARDING v. GREENING.

ACTION for a Libel. The plaintiff had been called in by a Mrs. *Lambert*, to give evidence before a surveyor on the subject of the defendant's bill, for work done for Mrs. *Lambert*. The defendant, being provoked by the reference, sent back an amended bill to Mrs. *L.* inclosed in a letter, which contained some very libellous observations upon the plaintiff. The letter was produced in evidence by the plaintiff. It was not in the hand-writing of the defendant; but appeared to have been written by his daughter, who was accustomed to write all the defendant's letters, to keep his accounts, and to make out his bills. The bill which had been the subject of dispute, was likewise in the hand-writing of the daughter. The plaintiff's counsel having proved the character in which the daughter acted, put in the letter, and desired that it might be read.

The act of the servant will not bind the master in actions of tort to the same extent as in actions in contracts.

Best, serjeant, for defendant, objected. The letter cannot be read. It is not the defendant's writing; and there is no evidence that it was written with his knowledge. The act of the daughter will not bind the father. The libel is proved upon her, and not upon him.

Vaughan, serjeant, *contrà*. Admitting that there is no proof of the defendant having written the letter, there is sufficient evidence to go to the jury

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that he authorised, and was privy to the publication. For example, a bookseller is made responsible, even criminally, for the publication of a libel by his servant, from his shop, without his master's knowledge. The act of the servant will bind the master as well in torts as in contracts. His daughter makes out his bills: *they* will bind the father; and the bill and the letter were sent together. It is to be presumed, therefore, that he was acquainted with the contents.

GIBBS, C. J. There is a marked distinction, perfectly familiar to our law, and consistent with the principles of *all* laws, between fixing persons with criminal and civil responsibility by the acts, or through the medium, of others. The acts of the servant are only the acts of the master *sub modo*; and the rule is narrower in actions of tort, than in actions on contract. The responsibility of the bookseller for the publication of a libel by his servant is not within the reason of this case. The daughter was the father's agent for the purposes of his business, but not to write libels. She might make him-responsible for acts within the scope of his authority; but no further. This is not evidence for the jury, for there is no recognition of the libel by the defendant.

Nonsuit.

Vaughan, serjeant, and *E. Lawes*, for plaintiff,

Best, serjeant, for defendant.

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SITTINGS AFTER EASTER TERM, AT GUILDHALL.

MILLS and WIFE v. SPENCER and WIFE.

ACTION for words. “Mrs. *Mills* is an old b——d; and, under pretence of keeping a shop, and taking apprentices, she keeps them for the purpose of prostitution, and as a decoy to young men.” Plea, 1. not guilty. 2. A general justification of the words. 3. A special justification; the import of which was, that a Mrs. *Sayer* and a Mrs. *Lewis* had communicated the substance of the imputed slander to the defendant’s wife; and that she had repeated it *bonâ fide*, naming her authors at the time of speaking the words.

In an action for slander, it is not competent for the defendant, under the general issue, to offer in mitigation of damages evidence that the specific facts in which the slander consists, and for which the action is brought, were communicated to him by a third person.

The words being proved by the plaintiff’s counsel, *Vaughan*, serjeant, for the defendants, stated, that he meant to abandon both the pleas of justification: but he proposed to call witnesses to prove, that the defendant’s wife had heard the specific charge, not from Mrs. *Sayer*, and Mrs. *Lewis*, the persons named in the plea, but from other persons; and that she had made the communication, by way of caution, to a Mrs. *Evans*, who was going to Mrs. *Mills*’s house, for the purpose of learning the business of dress-making. He said that he only proposed this evidence by way of mitigation.

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Best, serjeant, for plaintiff, objected to it.

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Vaughan, serjeant, *contra*. Lord *Leicester's* case is an authority for receiving it. It diminishes the malice, which is a material ingredient in the action. It extenuates the spirit in which the slander is uttered, to shew that it was not the defendant's invention; that it existed before as a current charge against the plaintiff's wife, and was so stated in terms to the defendant.

GIBBS, C. J. Lord *Leicester's* case stands on special circumstances. In that case, evidence of general suspicion was admitted. But here, you propose to mitigate the damages by shewing that the specific slander was communicated to you by a third person. You might under one of your pleas have given in evidence, that, at the time you made this charge, you mentioned the names of Mrs. *Lewis* and Mrs. *Sayer* as your authorities; because, by so doing, you gave the plaintiffs an action against them. As you do not propose to prove this, your justification avails you nothing. In this case, the slander imputed to the plaintiff is stated as a fact of the defendant's own knowledge; and she cannot, when called to answer for it, say—another person told me so. If an action be brought against *A.* for calling *B.* a thief, it is no defence for *A.* under the general issue, to prove that he was told so by *C.*: *A.* is answerable for the full measure of his slander. If he qualifies his charge, or annexes to it, at the time of uttering it, his author, (naming him) it opens another consi-

deration. General reports have been admitted in mitigation of damages ; but not the specific facts.

Verdict for plaintiff.

Best, and *Copley*, serjts. and *Barry*, for plaintiffs.

Vaughan, serjeant, and *E. Lawes* for defendants.

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Maitland v. Goldney, 2 East. 426.

According to the rule in *Lord Northampton's case*, 12 Rep. 133, supported in the case of *Davis v. Lewis*, 7 T. R. 17, and in *Maitland v. Goldney*, 2 East. 426, in order to justify the repetition of slanderous words spoken against another, the defendant must give a certain cause of action against the speaker ; and that must be done, not only by naming the author of the slander, but also by giving the very words used ; and it is not sufficient either to state words to the *same* effect, or to prove words to the effect of those alleged. For the rule in all actions of this sort is, that, although the plaintiff need not prove *all* the words laid, yet he must prove so much of them as is sufficient to sustain his cause of action ; and it is not enough for him to prove equi-

valent words of slander. But it should seem that a defendant could not, by naming the original author, justify the publishing, in writing, slanderous words *spoken* by such other. For, to write slander is a much higher offence than barely to speak it. It is chiefly, indeed, in this branch of the law of slander, that the action for words spoken, and words written, substantially differs. The common law, in respect to our natural passions, gives no action for mere defamatory words, which it considers as transitory abuse, and not having substance and body enough to constitute an injury by affecting the reputation. It confines, therefore, the action for oral slander, to such of the grosser kind of words as impute positive crimes, and to words which injure a man in his profession, trade, and calling. It does not consider

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words as amounting to a breach of the peace, and therefore, gives neither indictment nor information for unwritten slander, except in the case of seditious language, or words reflecting on a magistrate in the immediate execution of his office.

The reason of the law in this distinction is simple enough: it was necessary to punish the grosser and more palpable injuries, and it was equally convenient to pass over the less. The law, therefore, by classing the greater injuries, established the *criteria* of this distinction, and adhered to it closely in its practice. This reason, however, ceases, when the words, by being written, can no longer be considered as

the results of transitory passion or venial levity, but therein gain the shape and efficacy of a mischievous malignity. The act of writing is, in itself, an act of deliberation, and the instrument of a permanent mischief. What was before mere *convitium*, and contumely, grows into a deliberate charge and accusation. The law, therefore, both with respect to the public peace, and the prevention of private injury, allows an indictment and information, as well as an action on the case, for words written, which it denies to the same words when spoken.—*Thorley v. Lord Kerry*, 4 Taunt. 355. See the authorities likewise collected, *Law of Libel*, 2 Ed. 212, 13.

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SITTINGS AT WESTMINSTER, AFTER TRINITY
TERM, 57 GEORGE III.

June 28.

FERMOR v. PHILLIPS, Esq.

ACTION against the Sheriff of *Oxfordshire*, for an escape and false return. The count for the false return stated, "that the sheriff, to wit, on, &c. at, &c. arrested one *John Paxton*; and falsely returned to the court of our lord the King of the Bench, that the said *John Paxton*, to wit, on, &c. at, &c. rescued himself out of the custody of the said sheriff, and was not afterwards found in the said sheriff's bailiwick." Plea, not guilty.

It is sufficient to excuse the Sheriff, in an action against him for a false return, "that the defendant forcibly rescued himself," provided the fact be so: but if the defendant escape, owing to the negligence of the officer, this will not justify the return of a *rescue*.

Paxton, being indebted to the plaintiff in 725*l*. was arrested by a bailiff of the defendant's, and conducted to his own house. The officer had previously received a caution that *Paxton* was not easily to be arrested. He there proposed to give bail, and sent a friend to procure two house-keepers. The officer waited some hours in the house, when *Paxton* requested to go into his farm-yard. The officer went with him; but as soon as he got into the fields, he ran away and escaped. The sheriff's return was in the following terms: "*Oxfordshire*, to wit.—I, *John Phillips*, Esq. sheriff of the said county, humbly certify and return, that by virtue of his Majesty's writ to me

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directed, which is hereunto annexed, I did on the 11th day of November, in the 57th year of his Majesty's reign, arrest, and take the body of *John Paxton*, in the said writ named; whose body I safely kept, until afterwards, to wit, on the same day and year aforesaid, in the parish of *Banbury*, in the said county, with force and arms, the said *John Paxton* rescued himself out of my custody; and that afterwards, and before the return of the said writ, the said *John Paxton* was not found in my bailiwick."

Best, serjeant, and *Peak*, for the defendant, contended, that the sheriff's return was a sufficient answer. 'There was an arrest in obedience to the writ, and the facts proved in the case justified the sheriff in returning a rescue. The sheriff could not carry *Paxton* to the county gaol until twenty-four hours after the arrest. He had not authority, as in a case of execution, to take the *posse comitatus*. In Comyn's Digest, title *Rescous*, it was laid down "that if a *rescous* be made on *mesne* process, the sheriff may return that the defendant was arrested, *et seipsum rescussit, et non est inventus, &c.*"

GIBBS, C. J. There is a difference between a rescue by force, and an escape by negligence: Comyn must allude to the former. I admit that there may be a return as stated; and if, after the arrest, the debtor rescue himself *vi et armis*, the sheriff is not answerable. If *Paxton* had forcibly overpowered the officer and escaped, that would have excused the sheriff. But it is a question

which I shall leave to the Jury, whether the officer conducted himself properly in letting this man go about his farm-yard. I think he did not, after the caution he had received.

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Verdict for plaintiff, 50*l*.

Vaughan, and *Onslow*, serjeants, and *Smedley*, for plaintiff.

Best, serjeant, and *Peak* for defendant.

A similar point came before the court of King's Bench, in Michaelmas Term, 1817. The sheriff returned that the defendant had been arrested, but rescued himself with force and arms, to wit, on a certain day and place, &c. An attachment was obtained against the sheriff; and a motion was made to set it aside, on the ground that the proceeding was irregular, and that *seipsum rescussit* was a sufficient return. The authority in Co-myn's Digest, title *Rescous*, d. 4. was relied upon; and the above case of *Fermor v. Phillips* was cited. The court was of opinion, that the return of *seipsum rescussit* was sufficient; but they held the return to be defective on another ground, inasmuch as it did not allege that the arrest was

made in the sheriff's bailiwick, though it averred the rescue to have been there. *King v. the Sheriff of Middlesex*, M. T. 1817.

But a rescue is not a good return upon a *feri facias*, or a *capias ad satisfaciendum*; because, in cases of final judgment, the sheriff may take the *posse comitatus*. Show. 180. But if a return of rescue do not shew where the defendant was arrested, it is insufficient; for, perhaps, it was out of the county. Moor, 422. Bac. Ab. Vol. vi, 94. As, where a *luti-tat* was awarded against J. S., the sheriff returned a rescue on such a day, but did not mention any place where the rescous was made: the court adjudged it a void return, because it did not appear either that the arrest or rescue was within the

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sheriff's jurisdiction. But if it had appeared to have been done in the county, it should be intended to have been within the sheriff's bailiwick, *Wol-freston's case*, Yelv. 51. A return made by the sheriff that the person arrested was rescued out of the custody of the bailiff, has been held to be bad: the return must be, that he was rescued out of *his* cus-

tody. Per BULLER, Justice, 2 T. R. 156.

The sheriff's return of rescue is not traversable. *Barnes*, 429; and if the plaintiff suggest any fraud or falsehood, he is driven to his action for a false return. It is therefore necessary, that the return of a rescue should be certain, Yelv. 51.

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SHARP v. SCOGING.

THIS was an action for an assault, to which the defendant pleaded a justification. A witness, of the name of *Chilcott*, was called by the plaintiff to prove the assault; and the defendant's counsel called witnesses, who swore that they would not believe *Chilcott* on his oath.

When a witness's character is attacked in a court of justice, the questions should be confined to his general conduct, and should not point at specific charges.

Vaughan, serjeant, for the plaintiff, asked one of the witnesses if he had ever heard *Chilcott* tried for perjury.

Best, serjeant, *contra*. You may ask the witness his reasons for disbelieving *Chilcott*, but no farther.

GIBBS, C. J. When you endeavour to destroy the credit of a witness, you are permitted to call other witnesses who know him, and to ask them this general question—would you believe such a man upon his oath? You cannot ask them as to particular acts of criminality, or parts of conduct, because the question is as to general credit. Particular charges a witness might explain or repel, if he had the opportunity; but general character is the result of general conduct; and every witness who presents himself in a court of justice undertakes for that. I am, therefore, of opinion, that you cannot ask whether this man has been tried for perjury. But as no man is to be permitted to

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destroy a witness's character without having grounds to state why he thinks him unworthy of credit, you may ask him his means of knowledge, and his reasons of disbelief. You may contradict him if you can ; you may attack *his* general character if you are able, and fortify the credit of your own witness by fresh evidence.

Vaughan, serjeant, and *E. Lawes*, for plaintiff.

Best, serjeant, and *Platt*, for defendant.

Bull. N. P. 296. *Rockwood's* case, 4 St. Trials, 693. *Mawson v. Hartsinck*, 4 Esp. N. P. 102. *Phillip's Law of Evidence*, 3 Ed. 229. So, likewise, in the late trials of High Treason, in the Court of K. B. at bar, it was decided by the whole court, that if a witness, on being questioned (for the purpose of discrediting him) whether he had been guilty of felony, deny the charge, the party against whom the witness has been called will not be allowed to offer evidence to prove the charge. *Rex v. Watson*, T. T. 1817.

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EVELYN and WIFE v. RADDISH and Others.

THIS was an action of covenant for not rebuilding some houses in Rathbone Place. In 1765, *Glanville* had demised to a person of the name of *Huddle* the houses in question. There were covenants in the lease, by which the lessee bound himself, his executors, administrators, and assigns, to repair the houses within the two first years: he covenanted further, within the first fifty years, to take down the houses "*as occasion might require*," and in place of them to erect and build four other houses of the same scale and rank of building. The defendants pleaded that, after the assignment to them, and the expiration of fifty years, occasion did not require that they should rebuild, &c. and that the houses were in good repair.

Where freehold premises are upon lease, and there are several interests, viz. tenant for life, remainder in tail, and the reversion in fee; and there is a breach of covenant which gives the tenant for life a right of action, he can only recover such damages as are commensurate with the injury done to his life estate, and not the damages which may be sustained by the reversioner.

The plaintiff's wife was tenant for life of the premises, and the defendants became possessed of the lease by several mesne assignments. On the part of the plaintiffs it was contended:—1. That they had a right to have these houses rebuilt under the covenant; that repairing them was not a compliance with the contract. They had a right to expect, after fifty years, the re-edification of houses as good and substantial as they had originally been. The houses had already lasted fifty years. The defendants could not set up a substitution; viz. that they had repaired the houses, and


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that their present state was as good as if they had been actually rebuilt. A covenant to repair might extend to a covenant to rebuild, and the terms "as occasion might require" applied to the time of rebuilding, and did not relax the obligation of the covenant to rebuild at all events. 2. They contended, that the plaintiff's wife, tenant for life, was entitled to recover general damages on this covenant; that is to say, the whole amount of the damages sustained by the breach; and was not to be restricted to a compensation measured by the extent of her particular estate. That this was an entire covenant; and that the defendants were not to be answerable in several actions brought by those in remainder or reversion; but that the whole damages were due to the tenant for life, whose estate was now in actual enjoyment.

Best, serjeant, contra. The plaintiff can only recover such an extent of damages as may be sustained by her in reference to her particular estate. The reversioner, supposing there be a breach of covenant, is entitled to his action at the present time. His reversion may be deteriorated:—can the plaintiff recover damages for any injury done to the reversioner's interest in the fee?

GIBBS, C. J. The first question will be, is the covenant to rebuild, restricted by the words "as occasion might require," to be construed as if the words had been "if occasion required?" The plaintiffs contend, that the houses must be rebuilt at any rate. The defendants say, they are not bound to pull down the houses, unless, acting as

provident persons would act with regard to their own property, occasion, in other words, general prudence and expediency, should require it. With regard to the second point, I am of opinion that the tenant for life can only recover such an amount of damages as is commensurate with the injury done to the life estate. The tenant in tail, or in fee, may have an action on this covenant, and recover for the injury done to his reversionary interest. This is my impression; but the point is new, and I will reserve it.

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The Jury found a verdict for the plaintiffs.

Lens, and *Pell*, serjeants, and *Chitty*, for plaintiffs.

Best, *Vaughan*, and *Copley*, serjeants, for defendants.

A reversioner, as well as the party in possession, may bring an action for an injury done to the value of the inheritance. Thus, in an action for erecting a wall, whereby the plaintiff's lights were obstructed, the declaration contained two counts. In the second, the plaintiff counted as the reversioner; and after verdict, it was moved in arrest of judgment, that the action did not lie by the reversioner, being only an injury to the person in possession;

to which it was answered, that it was a damage done to the inheritance; and if the reversioner wanted to sell the reversion, this obstruction would certainly lessen the value of it. The court were of opinion, that an action might be brought by one in respect of his possession, and by the other in respect of his inheritance, for the injury done to the value of it. *Jesser v. Gifford*, 4 Burr. 2141. So, in *Biddlesford v. Onslow*, 3 Lev.

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209, it was held that both lessor and lessee should sue in respect of trees injured by a stranger; each claiming his distinct compensation according to the measure of the injury done to his particular interest; the lessor for the body of the tree, and the lessee for the shade and fruit. So may a copyholder, and the lord, 3 Lev. 131. So, if a stranger subvert land leased at will, the lessee may bring trespass against him, and have damages for the profits; and the lessor may have another action of trespass, and recover damages for the destruction of the land, 2 Roll. Abr. 551. But as the injury consists of two parts, an injury to a temporary right in the lessee, and to the permanent freehold of the lessor, the damages must be assessed with reference to the extent of their several interests: the lessee cannot claim what is due to the lessor, nor the lessor for the temporary interruption of

the enjoyment of the lessee. For where different persons have distinct rights in any subject matter, the compensation must be to each in proportion to the injury he has received. One of them cannot demand that part of the compensation which belongs to the other; nor can the satisfaction made to one be a bar to an action brought by the other, 3 Lev. 209. But see *Attersol v. Stevens*. J. T. demised land to the plaintiff, at an annual rent, for twenty-one years, with liberty to dig half an acre of brick earth annually: the lessee covenanted that he would not dig more; or, if he did, that he would pay an increased rent of 375%. per half acre, being after the same rate that the whole brick earth was sold for. A stranger dug and took away brick earth; the lessee recovered against him the full value of it. It was held that he was entitled to retain the whole damages, 1 Taunt. 183.

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BROADWATER v. BLOT.

THIS was an action on the case against the defendant to recover damages for his negligence in losing a horse of the plaintiff. The defendant was a farmer, and had received the plaintiff's horse to agist at a stated price. It appeared that the horse had strayed out of the defendant's field, and was lost. At the time that the horse was missed, several of the defendant's horses had likewise strayed, and had been pounded. The latter were recovered, but the plaintiff's horse was finally lost. The defendant had used considerable diligence to advertise it; and had offered to contribute a moiety of the plaintiff's expences in printing and posting hand-bills to obtain intelligence of the horse. The plaintiff gave some evidence of the bad condition of the fences on the defendant's farm; and likewise of general negligence in leaving open the gates of his fields, &c. It did not appear, however, that the loss of the horse was occasioned by the defect of the fences, or that he had strayed through the gates at the time that the witnesses spoke to their being open.

A person who takes in horses to agist, does not, like an innkeeper, insure their safety; he is answerable only in case of negligence.

Best, serjeant, for the defendant, contended, that, in order to make out a case to entitle the plaintiff to recover the value of his horse in this action, he must shew direct and positive negli-

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gence; either an insufficiency of fences by reason of which the horse strayed, or that the defendant permitted the gates to be open for an unreasonable length of time in the field where the horse depastured. A farmer, who took in horses to agist, was not like an innkeeper, or a carrier. It is true, he received a reward; but he did not warrant the safety of the horses. It was necessary to prove circumstances of negligence, either in the particular act itself by which the horse escaped, or to give evidence of gross negligence generally. Supposing the gate of the field had been set open wantonly, and that the horse had then escaped,—would the defendant have been liable?

GIBBS, C. J.—All the defendant is obliged to observe is reasonable care. He does not insure; and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstance which occasioned it. If there were a want of due care and diligence generally, the defendant will be liable. The question is, were the defendant's fences in an improper state at the time the horse was taken in to agist? Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff, who entrusted the

horse to him, had a right to expect? I shall leave it to the Jury.

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Verdict for plaintiff, the value of the horse.

Vaughan, serjeant, and *W. Reader*, for plaintiff.

Best, serjeant, and *Wilde*, for defendant.

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SITTINGS IN LONDON, 1817.

FREE and Others *v.* HAWKINS.

July 10.

1. In an action against the payee of a promissory note, who was likewise the indorser; held, that his indorsement was an admission of the hand-writing of the maker.

2. The payee is entitled to notice of the dishonour of the note, although there were no consideration between him and the maker.

ACTION by indorsee against the payee of a promissory note, of which Sir *Robert Salisbury* was the maker, and the defendant became the payee and indorser, as surety for Sir *R. S.* to the plaintiffs.

The only evidence of the making of the note by Sir *R. S.* was by proving the indorsement of the note by the defendant, which was objected to by *Lens*, serjeant. But,

GIBBS, C. J. ruled, from the analogy of a bill of exchange, where the acceptance is an admission of the hand-writing of the drawer, that the indorsement by the payee is an admission of the hand-writing of the maker.

The note was not paid when due by Sir *R. S.* and no notice had been given to the defendant; but evidence was called to prove that the defendant was merely a surety, and that, as between him and Sir *R. S.* there was no consideration. Evidence was likewise tendered to prove, that it was agreed between all the parties, that the note should not be put in suit till certain estates of Sir *R. S.*

were sold; and it was insisted by *Best*, serjeant, on the authority of *De Berdt v. Atkinson*, 2 H. Black. 336. and *Sisson v. Tomlinson*, 1 Selw. N. P. 357, *n.* that where there is no consideration, as between the maker and the payee, no notice of non-payment by the maker is necessary in order to charge the payee; in the same way as no notice is necessary to be given to the drawer of a bill of exchange who has no effects in the hands of the acceptor. But,

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GIBBS, C. J. adverting to the cases of *Smith v. Becket*, 13 East. 187. and *Brown v. Massey*, 15 East. 216. ruled, that the analogy contended for did not exist; and that the payee and indorser was under the circumstances entitled to notice; and he rejected the evidence offered, that there was an understanding that the note should not be put in suit, in order to excuse the want of notice; observing, that as such an understanding could not have been given in evidence to prevent the plaintiff from suing on the note, so it ought not to be received to excuse the want of notice.

Best, serjeant, and *F. Pollock*, for plaintiff.

Lens, serjeant, for defendant.

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LOVELOCK v. CHEVELEY.

The defendant cannot make, at the trial of the cause, any such objection to the particulars, which, if made earlier, the plaintiff, or the court, might have rectified.

MONEY had and received. The action was brought to recover a sum of money due upon a balance of account; and the defendant, who was an attorney, had given a notice of set off for business done by him for the plaintiff. The plaintiff, on receiving the notice, took out a summons for particulars; and Mr. Justice *Park* had made an order on the 18th of *June*, that the defendant should deliver his particulars *forthwith*. The particulars, however, were not delivered till ten days subsequent to the order; after the plaintiff had subpoenaed his witnesses, and the cause stood in the paper for trial.

Best, serjeant, and *Holt*, for the plaintiff, objected, that this was not a compliance with the Judge's order to deliver the particulars *forthwith*. An attorney's bill should be delivered in time to have it taxed. They cited *Martin v. Winter*, Douglas, 199, *in notis*, that an attorney's bill should be delivered in time for the plaintiff to get a taxation.

Copley, serjeant, *contra*. The plaintiff should have returned the particular if they were not delivered in compliance with the order. By keeping them, he waves the objection.

GIBBS, C. J. The demanding and granting of

particulars is almost a new system within the recollection of many of us. They undoubtedly facilitate the trial of a cause ; but they must not be permitted to obstruct the justice of it. The party who objects to the particulars, as insufficient, must make his complaint at the proper time. He cannot wait till the trial of the cause, and then raise an objection which, if earlier made, might have been disposed of. In this case, if the plaintiff had not time to tax the bill, he might have applied to the court ; but by keeping the particulars he has waved his objection.

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Best, serjeant, and *Holt*, for plaintiff.

Copley, serjeant, and *Comyn*, for defendant.

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BLANK v. SOLLY and Others.

Where a ship is freighted in contravention of the Navigation Laws, although the consignee accept the goods, and sell them, he is not answerable in an action for the freight.


THIS was an action to recover the sum of 848*l.* due for the freight of timber.

In August, 1816, *Gibson* and Co. of *Dantzic*, shipped the timber at that port, and consigned it to the defendants in *London*. The bill of lading was in the usual terms; that is to say, "the defendants, or their assigns, paying freight." On the arrival of the vessel the defendants entered her at the custom-house, delivered a manifest of her cargo, and began to unload her. Whilst she was unloading she was seized for a violation of the navigation laws, and upon the ground that she was not, in fact, a Prussian vessel. She was, however, released on condition that the cargo should be warehoused three months, and then exported. Security was given for a compliance with these terms, and the defendants afterwards received the timber, and subsequently exported it.

Lens and *Bosanquet*, serjeants, contended, that as the timber was brought into this country in violation of the navigation laws, freight could not be recovered. The goods were illegally conveyed; and, therefore, neither party could resort to a court of justice to enforce the agreement.

Vaughan, serjeant, *contra*. The ship being seized for a violation of the Navigation Act, the

defendants are immediately apprised of the breach of law which had been committed. They negotiate, however, with the custom-house, and obtain a release of the cargo, which they receive and export. It is too late, therefore, to object when they have had the profits of the cargo.

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GIBBS, C. J. The ship was the property of the plaintiff, and was navigated in contravention to a known system of municipal law. If this transaction had not been absolutely illegal. I should have thought that the defendants, by receiving the goods, had waved all objection to the contract, and that the plaintiff might have recovered on a *quantum meruit*. But I feel myself called upon to direct a verdict for the defendants, subject to the opinion of the court.

Vaughan, serjeant, and *Comyn*, for plaintiff.

Lens and *Bosanquet*, serjeants, for defendants.

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GIBSON v. BRAY and Another.

Goods sent to a trader upon sale and return, in the common acceptance of that mode of dealing, will pass to his assignees, under the statute of 21 James 1.

THIS was an Action of Trover. The defendants were the assignees of one *Markham*, a bankrupt; and the goods, for which the action was brought, were sent to *Markham* on sale and return. It was so expressed in the invoice, in which the goods were entered short; viz. in the inner column of the account.

The goods arrived on the 13th of November at Sunderland; *Markham* was not then at home, but the goods were taken in, and paid for, by his servant. His shop was open on the 13th: on the 14th, an execution came in; and on the 15th he committed an act of bankruptcy. The parcel containing the goods was not opened; but it remained in *Markham's* possession till he became a bankrupt. Some time after, the plaintiff's traveller demanded the goods of the assignees on the ground that they had been sent on sale and return.

Vaughan, serjeant, for the defendants. The question is on the nature of the contract. If the goods were a mere deposit, they would not pass to the assignees; but if they were in the order and disposition of the bankrupt, they came within the meaning of the statute of James. It did not matter how many days the goods were in *Markham's* possession. The invoice was a sale; it passed the property. It might be a conditional sale; there might be a liberty to return the goods. But the

possession was the circumstance to which the statute looked. By having *other men's goods* in his possession the bankrupt augments his visible stock, and thereby obtains a false credit.

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Best, serjeant, *contra*, for the plaintiff. This case was of the last importance to trade. The statute of James was meant, to defeat fraud and collusion, and not to take the *bonâ fide* property of one man to pay the debts of another. Here the contract was not a sale. It was a very frequent mode of dealing with tradesmen who wanted to force a custom. The trader, it is true, had a special property, like a factor, who must have the possession of the thing for which he negotiates; but the general property continues in the vendor. In this case there could be no false credit obtained; for the goods were not opened, or exposed in the bankrupt's shop. The bankrupt had exercised no authority over them; he had not carried out the figures in the invoice; he had not decided to take them; he had done no act of ownership respecting them. They were no further in his order and disposition than the furniture of an inn is in the order and disposition of the guest. Suppose the goods had been delivered at his house by mistake; would they then pass to his assignees?

GIBBS, C. J. The point is very important, and I will reserve it for consideration. We all know what is meant by the ordinary terms of sending goods on sale and return. They become the property of the trader so far, that he may sell them either for money or credit, and receive the proceeds; but if he is unable to sell them, the vendor

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cannot, as a matter of course, call upon him for the value of the goods, but he has a right to return them in *specie*. He is not a factor, nor any thing like it. The entry of the prices short in the invoice does not rebut the presumption that these goods were sent upon the ordinary terms of sale and return. If the goods had been sent for exhibition, or for speculation, the plaintiff soliciting the bankrupt to purchase them, they would not have been liable to the assignees. If a man sends goods to a tradesman, subject to his approbation whether he will accept them or not, the simple fact of possession by the tradesman would not be such a possession as the statute of James could work upon. But goods sent upon sale and return, in the ordinary meaning of that contract, are within the order and disposition of the bankrupt: he deals with them as his own stock; they procure him credit; and it is but reasonable that those who so trust him should take their chance with his other creditors. It is, however, a strong feature in this case, which sustains the claim of the plaintiff, that the parcel so sent was never opened, nor taken to by any express act of acceptance on the part of the bankrupt.

His Lordship directed a verdict for the plaintiff, subject to the opinion of the Court.

A motion was afterwards made; but the Court of Common Pleas was of opinion, that the case was not within the statute of 21 Jac. 1. c. 19.


Best, serjeant, and *Puller*, for plaintiff.

Vaughan, serj. and *Campbell* for defendants.

With respect to the case of reputed ownership, a most important head of the bankrupt laws, there is much difficulty in classing the decisions. It is obvious that the statute was directed against those collusive frauds which were often committed by persons in meditation of bankruptcy. Before this provision in the 21 Jac. 1. it seems to have been a common practice in traders to make a transfer of their property; but still to continue exercising every act of property over it as before. As between the buyer and the seller, the consideration might be good, legal, and sufficient; indeed, might have nothing fraudulent in it. The words of the act, indeed, point in terms to transfers made upon "*good consideration*." It becomes necessary to advert particularly to this part of the act, because it does not seem to have been sufficiently attended to in its application.—If such transfer had been made fraudulently, and without an equivalent consideration, the commissioners would have set aside the alienation as a matter of course, and would have conveyed the property *instantly* to the assignees. The mischief, in the contemplation of the act, was of another kind. It was directed against those persons, friends, or credi-

tors, of a trader, apprehensive of bankruptcy, who, for the sake of assisting him in trade, and being themselves secure, kept or took the title of his property, but left him in the apparent possession, reputed ownership, and full controul and disposition of the same; thereby procuring him a false credit, and exempting themselves, in a trading concern, from that common risk which belonged to them. The circumstance of a *good consideration*, therefore, belongs to this kind of transfer within the view of the statute.

It was necessary to explain this leading principle of the act, as most of the writers on this subject appear to have regarded its object as directed against fraudulent transfers. The unfairness of such transfers consists in the mischief which arises from the false appearance; and likewise from the advantage which a creditor, so acting, procures above others who deal in the ordinary course of trade. For whilst other creditors of the trader are obliged only to take their share of the general dividend, the creditor, acting under such a collusion, gets back all that part of his own stock, which at the time of bankruptcy is unsold. The transaction, therefore, is collusive; because it proposes an unfair

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advantage. It is mischievous because it exhibits a false appearance; but as respects the creditor at least, it must not be designated by the harsher name of fraudulent.

As the first object of the act is to protect trade against false appearances of property, and as the possession and apparent disposition of goods and chattels is *prima facie* evidence of such property; so the words of the statute are confined to goods and chattels exclusively. Hence the courts have always made a distinction between mortgages of real estates, or chattel interests in lands, and goods and other personal chattels. The act meditated by the statute, as we have above said, was the collusive holding of the stock by the trader, with the consent of the true owner; or, more frequently, the separation of the property of the goods, and the possession of them, for the security of a friendly creditor. With respect to real property, there was no apprehension of similar collusive transfers or trusts, because there could not be the same object. In the first place, real property is not stock in trade for the matter of trading; and, secondly, the possession of it is not, as in personal chattels, such an evidence of ownership as to induce credi-

tors to rely upon it. For example, real estates may be mortgaged; and we know that the almost universal condition of such mortgages is, that the mortgagor shall remain in possession. In the same manner, fixtures to a freehold are not within the act. But the necessary and usual implements of trade, though connected with realty (as for example, steam engines, threshing machines, &c.) fall within it: because they are strictly personal property; they add to the apparent substance of the trader; and are not within the same presumption as the fixtures to a freehold, which may be presumed to have the same condition with a mortgage on the estate.

Having sufficiently, as it is trusted, unfolded the principle of the act, distinguished the extent of its application, and the reason of its exceptions, we shall subjoin only such cases as appear to depend upon some nice circumstance, either of the rule or the exception.

I.—*Where Property has been left in the possession, order, and disposition, of the Bankrupt, by the consent of the Owner.*

From what has been above said in explaining the pe-

culiar objects of the statute, it is scarcely necessary to add, that all the cases under the act suppose a possession of the bankrupt with the consent of the owner; for if the bankrupt have such possession of the property of another without his consent, it will not pass to the assignees by the statute. Through all the cases it will be observed, that the law keeps a steady view upon its first object; namely, that of protecting trade against those fictitious appearances of property which induce credit. This principle is extended, indeed, very far, in order to guard against any collusion. Thus, where *A.* purchased hops from a merchant, and left them in his warehouse until he should re-sell them, paying rent to the merchant for the warehouse-room. The hops remained undistinguished from the rest of the merchant's stock, and he became a bankrupt. Upon the trial, it was proved to be a custom of the trade for hops to be left by the purchaser in the merchant's warehouse for a rent. It was held, however, that such custom not being clear, distinct, and precise enough, to enable others to know that the hops so left were *not* the property of the merchant possessor, they be-

came the property of his assignees upon his bankruptcy; as being in his possession, order, and disposition. *Thackthwaite v. Cock*, 3 Taunt. 487. So, in a case where an agreement was entered into between a wholesale dealer and a retail dealer, that the former was to supply the latter with goods upon *sale and return*, to the value of 100*l.*; the account to be settled monthly, when the goods were again to be made up to that value. The retail dealer became bankrupt; and the wholesale dealer brought an action against the assignees for the goods unsold, amounting to 61*l.* It was held, by Lord *Ellenborough*, that the goods passed to the assignees, as they appeared to the world to be the property of the bankrupt, and because the reputed ownership was calculated to procure him a delusive credit, *Livesay v. Hood*, 2 Campb. 83. So, in *Bryson v. Wylie*, 1 Bos. and Pull. 83, where a trader sold his dyeing plant, and kept possession of it, paying a rental for the use of it, it was held within the estate.—See likewise 7 T. R. 228, and *Darby v. Smith*, 8 T. R. 82. And again, where a partner, retiring from business, leased to others, who continued it, certain stills, vats,

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and utensils, proper for carrying on the business, and which had been used by the former partners; the continuing partners became bankrupts; and upon a question, whether such articles passed under the statute to the assignees, as being in the possession, order, and disposition, of the bankrupts, at the time of their bankruptcy, the Court of K. B. held, that the stills which were fixed to the freehold, did not pass to the assignees under the words *goods and chattels* in the statute; but that the vats, &c. which were not so fixed, did pass to the assignees, as being left by the true owner, in the possession, care, and disposition, of the bankrupts, as reputed owners, *Horn v. Baker*, 9 East. 215. But where the purchaser of goods, lying at a wharf in the name of the seller, received from him, at the time of sale, an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller for several months afterwards, during which time the seller disposed of a part; but, upon notice of the seller's insolvency, the purchaser carried the order to the wharfinger, and had the goods transferred into his own name, and

nine days after that the seller became bankrupt: the Court of K. B. held, that the assignees of the bankrupt were not entitled to the goods, for that a complete change of the property took place by the transfer made in the wharfinger's books; and that it would be highly dangerous by any construction to vary the time fixed by the statute, which comprehends such goods *only* as the bankrupt, by the consent and permission of the owner, has in his possession, order, and disposition, *at such time as he shall become bankrupt*, *Jones v. Dwyer*, 15 East. 21.

The consent of the owner is in all cases necessary; the statute always looking towards this as its main object; namely, the preventing such a collusion between one trader and another; as if one said, "I will trust you with these goods, and you may trade and make profit by them, but remember they are *mine*. I will not run the risk of your trade; though I will help you, on short accounts, for our common benefit." In a word, this is the kind of collusion towards which the statute is in all cases directed; and if the reader will bear it in his mind, it provides him with a clue for the determination in all. In

the following case, for example:—Where a woman, before marriage, with the consent of her intended husband, conveyed all her stock in trade, and furniture, to trustees, to enable her to carry on her business separately, and the husband did not intermeddle with them, and there was no fraud imputed to the transaction, it was held, that such effects, though fluctuating, were not assignable under the statute; for that the husband had not the order and disposition of the property with the *consent of the real owner*; that the trustee was the legal owner, and he gave no such consent for such purpose; and that the wife's possession, in the manner in which it was proved to have been exercised at the trial, was no evidence of fraud; for that she was to be considered as the agent of the trustee, *Jarman v. Woollaton*, 3 T. R. 618. See likewise *Ex parte Martin*, 2 Rose's Bankrupt Cases, 361. So, where a trader, who afterwards becomes a bankrupt, *adversely* retains possession of goods, so that the party entitled to them is obliged to sue him in a court of justice to obtain a re-possession, or to restrain such trader from disposing of the goods, such possession is not within the mean-

ing of the statute, because it is clearly not with the *consent and permission* of the owner, 1 Ves. 243.

In the case of a secret partnership, one partner being declared a bankrupt, and the secret partner then coming forward with a claim upon the joint property, a very strong doubt is entertained whether such secret partner could sustain his claim against this statute. We should think, speaking with all deference, after the authorities in this case, unquestionably not; for the two circumstances here concur which compose the particular act provided against by the statute. In the first place, the *stock* in trade is left in *possession* of the bankrupt solely; and, secondly, the *consent* of the secret partner is manifest in the thing. This opinion has, indeed, been disputed, by a decision in the Court of Exchequer, *Coldwell v. Gregory*, 1 Price, 119. But the Lord Chancellor has subsequently expressed an opinion contrary to the above decision, and reserved the determination of the same point for the assistance of some of the Barons upon the hearing, *Ex parte Dyster*, 2 Rose, 256. Indeed, we should apprehend that there cannot be much

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doubt upon the subject, when it is considered what is the nature of property in partnership stock; that it is property in the *whole*, and as respects trade at least, it has no qualification in its disposal. But the fact of the bankrupt being the *reputed* owner may of course be disputed by the party claiming the property against the assignees. He may shew that such reputation did not exist, or was founded on grounds which the law would not admit to be sufficient as a presumption of property in the possessor.—See *Gurr v. Rutton*, *ante*, 327, and *Muller v. Moss*, 1 M. and S. 335.

But still, upon the principles above stated, any casual or temporary possession, which belongs only to the ordinary course of trade, will not be within the reason of the statute, and of course not within its provisions. There may here, indeed, be a legal possession, but not of that kind contemplated by the act. Thus, in the case of a delivery of goods by sample, or by any other means, symbolical only of the contract. If such a delivery be given at the time of the contract as the circumstances and nature of the property will admit, though the possession of the chattel, in fact, remain

with the trader, and he becomes a bankrupt, it will not on that account pass to his assignees. Because, where the property cannot be absolutely delivered at the time of the contract, such intervenient and incidental possession is necessary. Thus, where goods are of a bulky nature, and are sold by a trader, a delivery of the key of the warehouse where such goods are deposited, is a sufficient delivery to take them out of the possession of the bankrupt, and to exempt them from the statute, *Manton v. Moore*, 7 T. R. 67. *Ryal v. Bowles*, 1 Atkins, 170. With respect to the property in ships, which depends upon particular statutes, and of which an absolute possession cannot be made, the transfer must be accompanied with certain legal forms: the proper documents and muniments must be delivered, to enable the purchaser to reduce the property into possession upon the arrival of the ship in port. With regard to this species of property the registry acts determine all the necessary forms; and they must be complied with. They are founded upon rules of general policy; and, though it may be hard in some particular cases to vacate contracts for the transfer of pro-

perty in ships, on account of the non-observance of forms; still, as this severity ensures the observance of them, it conduces to a general good, which more than overbalances any particular hardship. The registry acts have the same relation to shipping which the enrolment act has to annuities. They are severe, unyielding, regulations, in order to protect an extensive system of maritime policy. Thus, where a trader became a bankrupt, between the time of executing a bill of sale of a ship at sea to his creditor, and the time of such creditor's complying with the requisites of the registry acts, though such requisites were completed after the act of bankruptcy, and before the action brought, the assignees of the bankrupt were deemed entitled to recover the possession of the ship in an action of trover, *Moss v. Charnock*, 2 East. 399. In all these alienations, where the thing is not capable of actual delivery, and therefore such delivery is made, in part, or symbolically, the transfer by the bankrupt must be complete, and there must be no laches on the part of the purchaser. Thus, where the creditor permitted the ship to return to port and to go on a second voyage, and otherwise neg-

lected to take possession of her; even though the grand bill of sale was delivered to him, it was held to be within the operation of the statute.—See *Mair v. Glennie*, 4 M. and S. 240, and the cases there referred to in argument. But an actual possession need not be taken of the ship whilst she is in a foreign port, *Whitmarsh's Bankrupt Laws*, 101. Where a *chose in action* is assigned, all the cases agree that the security, if any, must be delivered over to the assignee. And where a bond is assigned, it must not only be delivered to the assignee; but it would be necessary (as it appears from some cases) that actual notice ought to be given to the debtor of the assignment, 1 Ves. 348, and 1 Atk. 171. But in the case of book debts, as there is nothing that can be delivered, a simple notice to the debtors will be sufficient.—*Id. ibid.*

II.—*Property left in the Possession of the Bankrupt for a particular Purpose.*

There is some nicety under this head; but the cases may all be referred to the principle of the rule, and the exceptions above stated. If the bankrupt be in possession of goods left with him for some particular or limited purpose, such

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possession is not of itself within the reason of the statute. For his possession being restricted to *such* purpose, he has no power to sell or dispose; and therefore not to exercise, *with the consent* of the real owner, such acts as might induce an opinion of property. For example, if a trader be a depositary of another man's goods, or possess them by a contract of hiring and letting, as the furniture in a hired lodging, they are not within the statute; because, although he has the *use* of such property, he has not the order and disposition thereof. But this special trust and limited right of disposal may of course be negatived by evidence to the contrary; and a collusion for the purpose of giving the bankrupt a better appearance with his creditors, may, if such be the case, be proved to be the real design of the possession. Likewise, if there be a palpable laches on the part of the owner, this will be considered as a strong presumption of the collusion above-mentioned. Every case, in short, must depend upon itself; the leading principle of the act being always kept in view, namely, that of preventing a false credit, procured by collusive trusts. Thus, where goods were left in the possession

of a bankrupt in trust to sell for another, it is not a possession within the statute. As where *A.* made a bill of sale of leases and personal estate to *B.* and *C.* in trust to pay *A.*'s debts; at first *B.* acted in the trust; but afterwards *C.* took the whole into his possession, and acted alone, and became a bankrupt. The Court held the possession not to be within the statute, *Copeman v. Gallant*, 1 Peer. Will. 314. So, where a merchant bought and shipped goods in his own name to one of the King's yards, and it was delivered to the use of a carpenter, who had contracted to perform some work there, and the carpenter became a bankrupt; it was held, that although the bankrupt had the *possession* of the property, and the *apparent* disposition of it, yet as there was no fraud in the case, actual or constructive, and as the *real property was the merchant's*, the statute did not operate upon it, *Collins v. Forbes*, 3 T. R. 316.—See likewise 1 Atkins, 185, and *Walker v. Burnell*, 303.

III.—Property left in a Bankrupt's Hands as a Factor, Banker, Broker, &c.

All the cases under this head depend upon one single circumstance, namely, the ab-

sence of a *confusion* of the goods of the principal and the factor; or, in other words, the possibility of separating and distinguishing the property of each. Thus, if the factor sell his principal's goods, and buy other goods with the proceeds, the principal is entitled to the goods. *Whitcomb v. Jacob*, 1 Salk. 100. So, if goods consigned to a factor are sold, and the factor receives bills and notes for them instead of money, and then becomes bankrupt, the principal is entitled to such notes. *Scott v. Surman*, Willes, 400. So, where bills or notes are sent to a merchant or banker to be specifically applied, and he becomes a bankrupt, without having parted with such bills or notes, they will not pass to the assignees. *Tooke v. Hollingworth*, 5 T. R. 215; and see the cases in Whitmarsh's Bkt. Laws, 105. But if bills are deposited with a banker, and indorsed, and the banker disposes of them, and becomes a bankrupt, they cannot be recovered. *Collins v. Martin*, 1 Bos. and Pul. 648. Under this head the question of lien frequently occurs, which is evidently of a different nature from the claim of property; being an *obligation* upon property, and not the right of

property itself. This is the ground of distinction. The cases are numerous; but the principle in all is intelligible. See *Giles v. Perkins*, 9 East. 12. *Ex parte* Pease, 1 Rose, Bkt. ca. 232. *Ex parte* the Wakefield Bank, *ibid.* 243.—See likewise the same collection of cases, 254 and 280; and 17 Vesey, 270.

IV.—*Where Property is left in the Bankrupt's Hands as Trustee, Executor, or Administrator.*

Here the principle is manifest. The possession is necessarily independent of all collusion. A trader is not put out of the rights and duties of social intercourse, merely because he is a trader. He may become, as matter of course, the executor of a friend, or the trustee of a marriage settlement, &c.

Thus, where the wife of the bankrupt administered to her father, and became possessed as administratrix of his effects, to which she and her infant brother and sisters were entitled, and the husband continued the business of the father for their benefit; Lord Eldon, notwithstanding, held, that this was not such a possession of the goods by the bankrupt, as could be deemed an order and

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disposition within the statute, so as to make them liable to his creditors. *Viner v. Cadell*, 3 Esp. N. P. C. 88. See likewise, *Butler v. Richardson*, Amb. 74. *Bedford v. Woodham*, 4 Vesey, 40; and *Winch v. Keeley*, 1 T. R. 619. So, where *T.* held shares in a trading company in trust for *W.* who, by his will, appointed *T.* his residuary legatee, *T.* continued in possession of the

shares, and became a bankrupt. Lord *Redesdale* held, that *T.* being a trustee, the shares were not left in his possession within the meaning of the statute, so as to entitle the assignees to take them; but that *T.* was the true owner and proprietor of the shares, subject to the debts and legacies of *W.* *Joy v. Campbell*, 1 Scho. and Lef. 328.

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ASSUMPSIT.—The plaintiffs were builders; and had purchased property at a sale, conducted by the defendant, as an auctioneer. The plaintiffs being the highest bidders, the lot was declared to be their's; and they signed an agreement to complete the purchase, according to the conditions of sale. They likewise paid into the hands of the defendant 200*l.*, as a deposit, and a security for their performance of the contract. Objections being taken to the title deeds, a long negotiation commenced between the vendor and vendee; and from the year 1813, when the property was first put up to auction, until the year 1817, different treaties had been carried on, and arrangements proposed. Finally, however, the contract was rescinded; and the plaintiffs now brought an action against the defendant, to recover the amount of the deposit money, together with interest, from the time of its having been paid into the hands of the auctioneer; and the expences which the plaintiffs had been obliged to incur in investigating the title to the property. The defendant had paid the amount of the deposit into Court.

An auctioneer is not liable to pay interest upon a deposit, kept in his hands during the investigation of a title. He is to be considered as a mere agent, unless he specially engage as a principal in the sale.

Pell, serjeant, for the plaintiffs, contended, that they had not only a right to recover the interest of the money, but the expences of investigating the title. 1. Interest was due in all cases where

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the sum sought to be recovered was liquidated, and was detained in the hands of the receiver beyond the period when it ought to have been paid. At least it was competent for a Jury to calculate interest in the amount of damages. In this case the defendant had the use of the money. He might have employed it beneficially; and the plaintiffs had been deprived of the fair profits of it. 2. The expence of investigating the title was incurred as well for the benefit of the vendee as for the vendor; and the plaintiffs were entitled to recover a moiety of this expence, if not the whole.

Lens, serjeant, contra.—The defendant was a mere agent, or stakeholder, between the parties. He had no power or controul over the money; he could not invest it in any public security. He could not trust it out of his hands for the purpose of producing interest, but might be compelled to pay it over at any moment. An auctioneer, wilfully detaining money, might be liable to pay interest. But, at any rate, it should be shewn that the money was first demanded. With respect to the expence of investigating the title, there was no pretence for the demand. The defendant had never made himself a principal in the transaction, and was merely a trustee for both parties.

GIBBS, C. J.—I cannot think that an auctioneer, who does not mix himself as a principal in the transaction, but merely receives a deposit, to hold upon the condition, that, in case the purchase be completed, he shall pay such deposit to the vendor,

and if it be not completed, he shall return it to the vendee, is to be charged with interest. I know of no case to this effect; and I am sure the practice is the other way. As to the expences of investigating the title, they are foreign to the case. The auctioneer is not liable to pay them. But the question of interest being new, I will reserve it for the opinion of the Court.

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Verdict for defendant, subject, &c.

Pell, serjeant and —, for plaintiffs.

Lens, serjeant, and —, for defendant.

In Michaelmas term the facts above stated were put into a special case, when the Court, *absente* the Lord Chief Justice, coincided with the opinion which he had given at the trial; and, with regard to the demand of interest, they said, that the defendant could only be considered as an agent; that auctioneers generally were not liable for the interest of deposits lodged in their hands, but that some peculiar circumstances might af- fix this liability upon them. That, in the present case, no demand was made upon the defendant for the money till the action was brought; and that, until such demand and refusal, the question of the liability of an auctioneer could scarcely be agitated.

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FRIERE and Another v. WOODHOUSE.

In effecting a policy of insurance, a circumstance of intelligence, inserted in Lloyd's Lists, need not be communicated to the underwriters, however important it may be to the computation of the risk; for it is to be presumed within their knowledge, and to be taken into account.

THIS was an action on a Policy of Insurance on the ship *Louisitania*, from the *Brasils* to *Lisbon*, including the common risks. The question was, whether there had been an undue concealment at the time of the insurance. The policy had been effected by the broker, who went to the underwriters, exhibiting a letter from the plaintiffs, in which they stated—"Our ship, the *Louisitania*, sailed from *Maranham* to *Lisbon*, on the 1st of *September*, 1815. We have to request the favour of your effecting an insurance on her account. We are not alarmed at her having been fifty-seven days on her voyage, as there have been many contrary winds. We are, &c."

This letter was dated, *Lisbon*, the 27th of *October*. No other communication was made to the defendant; but it was in evidence that the plaintiffs had received a letter from their agent at *Maranham*, dated *August* 31, 1815, which letter had been brought by another vessel, the *Victoriosso*. The latter vessel sailed from *Maranham* on the 1st of *September*, in company with the plaintiff's ship the *Louisitania*; and arrived at *Lisbon* on the 17th of *October*, being ten days before the plaintiff's letter to their broker to insure. The usual passage from *Maranham* to *Lisbon* is between 60 and 70 days. It appeared, moreover, by *Lloyd's* Lists, that between the 1st of *September* and the

27th of October several vessels, besides the *Victorioso*, had arrived at *Lisbon* from *Maranhã*. The plaintiff's vessel was lost shortly after she left *Maranhã*.

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Best and *Vaughan*, serjeants, for the defendant, contended, that the plaintiffs had concealed a material circumstance which ought to have been communicated to the underwriters. They should have mentioned the arrival of the *Victorioso*, which sailed in company with their ship. Their communication to the underwriters was not candid and explicit.

Lens, serjeant, and *Puller*, contra. The arrival of the *Victorioso* was in *Lloyd's* List, which may be considered, for this purpose, equivalent to a special communication to the underwriters. What was commonly known at *Lloyd's* need not be communicated.

BURROUGH, J. This is not a concealment to vitiate the policy. The material facts were honestly disclosed in the letter; and the arrival of the other vessels at *Lisbon* from *Maranhã* (however important this intelligence might be) must be presumed within the knowledge of the underwriters, from the circumstance of its being contained in *Lloyd's* printed Lists. What is exclusively known to the assured ought to be communicated; but what the underwriter, by fair inquiry and due diligence, may learn from the ordinary sources of information need not be disclosed. It is, however, a question for the Jury.

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The Jury, which was a special Jury of merchants, said, that inasmuch as the arrival of the *Victorioso* and of the other vessels was noticed in *Lloyd's List* at the time the insurance was effected, and as these Lists were in the hands of the underwriters, they were of opinion that there was no concealment.

Verdict for plaintiffs.

Lens, serjeant, and *Puller*, for plaintiffs.

Best and *Vaughan*, serjeants, for defendants.

See *Durrell v. Bederley*, classed, and commented upon, 283, *ante*; in the note to as far as relates to the question of concealment, which the cases are collected,

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ARBOUIN and Another, Assignees of BAYFIELD, a
Bankrupt, v. HANBURY and Another.

THIS was an action of trover to recover the value of some wine and spirits. The bankrupt, *Bayfield*, employed the defendants as his bankers; and they had been accustomed to accommodate him with discounts. On the 3d of June, 1816, he deposited with them, in aid of his account, a bill for 40*l.* drawn by himself upon one *Arnold*. On the 17th, the defendants, hearing that *Arnold* was in embarrassed circumstances, and apprehending that he would not be able to take up his acceptance, which became due in August, went to the bankrupt, and asked him if he would be in cash to honour the bill he had deposited with them. He told them that he was afraid he should not be able to stand, and had no prospect of taking up the bill. They then inquired if he had committed an act of bankruptcy: he told them he had not. Upon which they proposed that he should make a transfer of the wine and spirits, for which the action was brought, to them, by way of collateral security for the bill when it should become due. The bankrupt hesitated: but, upon their telling him that unless he made the transfer they would not permit him to draw any more money from his account, he consented to the proposal. He had then a balance of 140*l.* in their hands; and he afterwards drew a check,

Where the creditor acts adverse to the views and wishes of the trader, and by urgency, and importunity obtains a transfer of property, to cover his liability upon a bill then running, (which bill he had discounted,) although such transfer be made on the eve of bankruptcy, it will not be a fraudulent preference on the part of the trader.

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which they paid, for 35*l.* He committed an act of bankruptcy on the 22d.

Vaughan, serjeant, and *Reader*, for the plaintiffs, contended, that this was a voluntary preference. There was no threat. The bankrupt, having disclosed his circumstances, and stating that he could not go on, the defendants request a transfer of part of his stock, which, without any compulsion of law, or any threat which ought to operate on a steady mind, he consents to make. It is true that they refuse to let him draw a check unless he makes the transfer; but this they had no right to do, because he had an ascertained balance in their hands, and he might have maintained an action for it *instantly*. He had, as yet, committed no default on the bill, of which he was only the drawer, and which had two months to run.

Best, serjeant, and *Nolan*, *contra*.

BURROUGH, J.—I always think questions of this sort should be left, in as unmixed a state as possible, to the decision of a Jury, who are the best judges of the acts and motives of men. The case is clear upon this point. A bankrupt, contemplating a commission, shall not single out one creditor in preference to another; but any creditor may endeavour to gain a preference by urgency and importunity, by diligence in fact; or diligence in law. It is not contended in this case that the importunity of the defendants was colourable. *They* send for the bankrupt, and require security. He does not single out and so-

licit them. Whether *Bayfield* contemplated bankruptcy or not, it was immaterial for them to enquire. They satisfy themselves by asking him the question, whether he had committed an act of bankruptcy, which he answered in the negative. He had then the *jus disponendi*. They demand security. What is this but the just and natural diligence of a creditor? The bankrupt hesitates; but at length consents. It is said, that the threat of not answering his check was futile, inasmuch as he had a right to draw. Be it so; it *was* a threat, notwithstanding: and it is a strong circumstance to negative a fraudulent preference. Where the creditor *bonâ fide*, and not colourably, acts adverse to the views and wishes of the trader, by urgency and importunity, and thereby obtains payment, there is no fraudulent preference. Had the proposal to transfer originated with the bankrupt, it would have been another question; but I can see nothing to impeach this transaction.

Verdict for defendants.

Vaughan, serjeant, and *Reader*, for plaintiffs.

Best, serjeant, and *Nolan*, for defendants.

In the treatises on the bankrupt laws much has been written, upon the effect of a preference given to a creditor by a trader under a contemplation of bankruptcy, or in a condition of circumstances from

which it is a necessary inference, that the trader foresaw his insolvency.

The cases under this head depend upon one simple principle; namely, that all the effects of a trader, in such a state of cir-

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cumstances, belong *equitably* to the whole of his creditors; and that, although he has still the *jus disponendi*, because he has not actually committed an act of bankruptcy, the equity of disposing of his property, in preference to a favoured creditor, is gone; and it is the policy of the bankrupt laws to consider such disposition of the trader's effects as made *in fraudem legis*. This is the principle.

But to bring any particular case within this principle, that is to say, to render it a fraudulent preference, two things are manifestly necessary:—
1. The contemplation of bankruptcy. 2. A *voluntary* preference, (an act immediately moving from the free will of the trader) made under such contemplation, or expectation, of bankruptcy.

These two circumstances being necessary, the following limitations naturally attach to the above principle:—

1. The act of bankruptcy must not have been committed at the time of the preference given. For if so, the trader is not at that time in possession of the *jus disponendi*; and, therefore, of course, has no right of transfer in the first instance. 2. He must not have given such preference un-

der terror of law, or any demand or compulsion, urgency, and importunity, from which such terror may reasonably be inferred. Because the act in that case is not voluntary; it does not flow from his immediate free will. This is the whole doctrine.

It may be observed, in fine, that the doctrine of such cases of fraudulent preference flows entirely from an equitable construction of the bankrupt laws, and not, as in the preceding note on reputed ownership, from the strict letter of the statutes of bankruptcy. It was much expanded, if not altogether established by Lord Mansfield, in the celebrated case of *Harman v. Fisher*, Cowp. 123. This, indeed, is one of those cases in which the learning, and, still more, the ability and sagacity of Lord Mansfield, contrived to introduce a larger equity into commercial law, without, at the same time, departing from the precision and exactness, required by the different natures of courts of common law and equity.

In *Harman v. Fisher*, Cowp. 123, it was adjudged, that the property was not transferred, because an act of bankruptcy was previously committed. In *Harvey v. Liddiard*, 1 Stark.

123, the case was this:—*A.*, shortly before his bankruptcy, drew a bill; and having procured it to be discounted, gave *B.* (a creditor) an order to receive the amount, which he directed *C.*, who discounted the bill, to transmit to *B.*, by a carrier. An act of bankruptcy was committed on the 17th of May; the money arrived in London on the 18th; and, on the 19th, it was received by *B.*'s porter. Lord *Ellenborough* ruled that, whilst the money remained in the hands of the carrier, the property remained unaltered, and therefore the assignees were entitled to it. In *Rust v. Cooper*, Cowp. 629, where a pretended sale was made of a part of a trader's goods to a particular creditor, a bill of parcels made out, and the goods delivered before an act of bankruptcy committed, it was held fraudulent and void. Here, it will be observed, was the *jus disponendi*, because the transfer was before the bankruptcy: but the equitable right of disposition in preference was gone, because made under a state of affairs indicative of insolvency. The good consideration, as respects the individual creditor preferred, is nothing. He is presumed to be a *boné fide* creditor, and the

debt to be due to him. As respects the bankrupt and himself, there may be the strongest moral and honourable reason for such preference. But this is not sufficient. There are, in fact, three parties concerned in the transaction;—the bankrupt, the favoured creditor, and the remaining creditors.—The fraud is against the last party; and the two former shall not consult their honour or feeling from a stock which belongs in common to the whole. Thus, in *Martin v. Pettress*, 4 Burr. 2477, where a trader made an absolute sale of goods, but at prime cost, it was held to be a fraudulent sale; perhaps a fraudulent return of goods, which, having come into the stock of the bankrupt, were equitably divisible amongst his whole creditors. So, where the bankrupt indorsed and sent a promissory note, by the post, to a creditor, in contemplation of bankruptcy, the assignees were held entitled to the note.—*Alderson v. Temple*, 2235.

But where the preference is consequential, that is to say, is not directly intended by the bankrupt, but only incidentally becomes such, in this case, as the free will of the bankrupt is wanting, it will not be held a fraudulent

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preference. Thus, in *Harman v. Fisher*, above cited, Lord Mansfield said, that if a preference were only consequential, the case might be different; as if a payment were made, or an act done by a trader, in pursuance of a private agreement. As in the following case:—*A.*, whilst he was solvent and resident at Calcutta, directed *B.* at Bombay, to transmit certain proceeds to *C.* in England, who acted as the agent of *A.*, under a power of attorney, and was in the habit of accepting bills for him. The proceeds were remitted by *B.* to *C.* after an act of bankruptcy committed by *A.* But Lord Ellenborough held, that as the remittance was made in pursuance of an order given by *A.* whilst he was solvent, and without fraud, *C.* was entitled to retain the amount for his balance. *Jamieson v. Hodson*, 1 Starkie, 150.

But in a case where bankers had fraudulently sold out stock which belonged to a customer, but stood in their names, and applied the proceeds to their own use, and whilst they remained solvent wrapped up certain bonds belonging to them in an envelope, inscribed with the customer's name, and enclosed a memorandum, stating that they had

deposited the bonds with him as a collateral security for his stock, which they promised to replace: they then deposited the parcel amongst securities belonging to other persons who dealt with them, but did not give any information of the circumstances to the customer, until the evening before their bankruptcy, when they sent him the parcel with the bonds, saying, they must stop payment next morning; Lord Ellenborough, in this case, held, that the customer could not retain the bonds against the assignees of the bankrupts; and the Court of King's Bench afterwards confirmed his direction. *Wilson v. Balfour*, 2 Campb. 599. The reason of this case is evident upon the principles above stated. For, as a claim of the highest degree upon the part of the creditor could not justify such preference; so neither, *a fortiori*, would the strongest honourable obligation of the trader. He could not amend his own fraud at the expense of his general creditors. But, where a trader obtained bills of exchange from the defendant upon a fraudulent representation, that a security given by him to the defendant (which was void) was an ample security, and on the next day,

having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them; and, three days after, committed an act of bankruptcy: after which, he returned to the defendant all the bills (except one which had been discounted) and also two bank notes, part of the proceeds of such discount; the defendant delivered back the security, and afterwards a commission issued against the trader, and the assignees brought an action of trover against the defendant for the bill and bank notes: It was held in this case, by K. B. that the defendant was entitled to retain them, as the bills were originally obtained under a false pretence of giving a good security; and, under such circumstances, a court of equity would order the property to be restored; and, therefore, it would be useless for a court of law to permit *that* to be recovered which could not be retained. *Gladstone v. Hadwen*, 1 M. and S. 517. The distinction of this case from the former is evident. The trader only returned what he had no right to possess. He did not amend his own fraud at the expence of the credi-

tors, but declined to benefit the creditors by means of such fraud.

Where a trader, knowing himself to be insolvent, called upon his creditor, and informed him of it, and the creditor thereupon said that he must be paid his debt, which was accordingly done, and the trader immediately afterwards became a bankrupt; this transaction was held to be void. The Court of C. P. very justly concluding, that the circumstance of the *trader calling upon his creditor, and disclosing to him his situation*, and then acceding to his request of payment, afforded strong grounds to infer a fraudulent preference. *Singleton v. Howell*, 2 Bos. and Pull. 283. In this case, indeed, it was evident, that a preference was intended by the trader; and the demand of the creditor was a mere pretext in order to make out the circumstance of compulsion.

2. But where a trader gives such a preference under a *threat or apprehension of legal process, civil or criminal*, or from the pressure and importunity of his creditors, or in any case which derogates from his free will, and does not justify the suspicion of collusion; in such case, the trans-

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action is valid; the law, holding the creditor to have used only his fair right in outstripping others, and the trader not to have given a voluntary preference, but to have consulted his immediate personal safety. *Thompson v. Freeman*, 1 T. R. 155. *Cosser v. Gough*, 1 T. R. 15. *Ex parte Scudamore*, 3 Ves. 85. *Yeates v. Grove*, 1 Vesey, jun. 280. *Holberd v. Anderson*, 5 T. R. 235. *Smith v. Payne*, 6 T. R. 152. *De Tastet v. Carroll*, 1 Starkie, 88.

3. The question, as we have said in all these cases, will be, Was the free will of the bankrupt left to him or not?—If the transfer be voluntary, bankruptcy, of course, being in contemplation, it cannot stand; but if the preference be given to a creditor, under an apprehension, however *groundless*, of legal process (as this is a sufficient indication that the act is not fraudulent), such preference will be valid; for, *per* Lord Mansfield, in *Thompson v. Freeman*, 1 T. R. 155.—“A bankrupt, when in contemplation of his bankruptcy, cannot, by his voluntary act, favour any one creditor; but if under fear of legal process he give a preference, it is evidence that he does not do it voluntarily.

And though the defendant in this case had taken no steps to secure himself in case he was called upon, yet the bankrupt acting from mistake was under the same apprehensions of legal process, as if the defendant had actually threatened her; so that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundless that might be.” But where the acceptor of a bill of exchange, two days before the expiration of the time for which the bill was originally drawn, called upon the indorser, and informed him privately that he was insolvent; the indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce; whereupon the acceptor paid it, and four days after became bankrupt; and it also appeared that the bill had been altered so as to make it fall due before this transaction, but without the defendant's knowledge: the Court of C. P. held, that this was sufficient proof of fraudulent preference to defeat the payment of the bill: *Singleton v. Butler*, 2 B. and P. 283. But where a creditor, in contemplation of bankruptcy, and

without solicitation, sent three checks into the hands of his clerk, to be delivered to a creditor at the counting house of the latter; but before they were delivered the creditor called upon the trader, and demanded payment of his debt, Lord *Ellenborough* held, that though there was an intention of giving a voluntary preference, that intention not having been consummated, the payment stood good. "*The intermediate demand*," says his Lordship, "takes it out of the cases hitherto decided upon this subject." *Bayley v. Ballard*, 1 Campb. Rep. 416. See likewise 1 Starkie, 150, and *Alley v. Hotson*, 4 Campb. 325.


But if a debtor, at the instance of his creditor, gives goods out of his shop, in part payment of a bond not then due, and shortly afterwards become bankrupt, the mere circumstance of the bond not being due will not alone vitiate the part payment, on the ground of fraudulent preference. *Hartshorn v. Slodden*, 2 B. and P. 582. For a bankrupt, as we have already said, has the disposition of his property till the moment when he commits an act of bankruptcy; and unless he dispose of it *in fraudem legis*, his transfer will be good. Fraud, indeed,

changes the complexion of things both in civil and criminal cases. "Thus, (*per* Heath, Just.) if thieves, under pretence of legal process, persuade those within the house to open the door, and then rush in and rob the house, it is nevertheless burglary, for the law will supply the breaking, because the device by which they entered was *in fraudem legis*." But it is not sufficient to impeach a payment, that the debtor voluntarily pay his creditor, unless at the time he so pay him he has an act of bankruptcy in contemplation. If a father advance portions to his children, such advance is voluntary, but not fraudulent, unless in contemplation of bankruptcy. *Id. ibid.*

So, where a trader delivered a quantity of goods to the defendant, who was under acceptances for such trader payable at a future day, which delivery of goods was, clearly, not voluntary by the trader, but made in consequence of the urgency of the defendant to be indemnified in case of the non-payment of the acceptances; the transaction being *bonâ fide*, and not colourable, was held not to be such a voluntary preference on the part of the trader (who afterwards became bankrupt) as would ren-

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der the transaction invalid. *Crosby v. Crouch*, 11 E. R. 256. Urgency on the part of the creditor for a security, provided there be no suspicion of collusion, has been held sufficient. In *Smith v. Paine*, 6 T. R. 154, Lord Kenyon says, "There is no occasion for a creditor under such circumstances to threaten an actual arrest;" and in *Crosby v. Crouch*, Lord Ellenborough says, "that *bonâ fide* urgency for a security will exclude the security from being considered as a voluntary one: and it is immaterial whether the debtor had or had not an act of bankruptcy in contemplation at the time, if the creditor *pressed* for payment or security, and *thereby* obtained such payment or security."

Where a trader, being pressed by a creditor for payment or security, one or other of which, he said, he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home, and became a bankrupt; this, inasmuch as the act done did not redeem the trader even from any present difficulty, which is the ordinary motive for such an act, when really done under the pressure of a threat, is


evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor, in contemplation of bankruptcy; and is therefore void, as against the assignees of the bankrupt. *Thornton v. Hargreaves*, 7 E. R. 544. *Sed quare* this case, which depends upon the particular circumstances.

But, in a case where *A.* on the 8th of October purchased goods of *B.* for the purpose of exportation; but finding that he must stop payment, and that he could not apply the goods to the purpose for which they were bought, he returned them to *B.* on October 16th: on the 17th, he stoppt payment; but, expecting remittances from abroad more than sufficient to pay his debts, conceived that his creditors would give him time: they refused; and he was made bankrupt on November 2nd. In an action by the assignees against *B.*, for the value of the goods; it was holden by the Court of C. P. that the jury were warranted in finding, that the delivery of the goods to *B.* was not made in contemplation of bankruptcy. *Fidgeon v. Sharp*, 1 Marsh, 196.

So, where a creditor obtains a preference in contem-

pation of an intended deed of composition, which would be fraudulent against the creditors under that deed: the composition going off, the creditor may hold his securities against

a commission of bankrupt subsequently issued, and not contemplated at the time of the preference. *Wheelwright v. Jackson*, 5 Taunt. 109.

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YORK.

SUMMER ASSIZES, 57 GEORGE III.

July 19.

GLEADON v. TINKLER and Others.

A. B. and C. are part owners in a ship. *A.* directs *B. and C.* not to order any repairs in their joint names, and informs them that he will no longer consider them as managing owners. Repairs were done in their joint names, upon the direction of the Captain employed by *B. and C.* Held that *A.* was jointly liable.

THIS was an action for the repair of a ship. *Wilkinson*, one of the defendants, had let judgment go by default; *Thorney*, another of the defendants, had pleaded his bankruptcy; and a *nolle prosequi* was entered as to him. The question was, whether *Tinkler* was liable to the repairs. It was in evidence that he was the owner of a third part in the ship. The Captain, who was employed by *Wilkinson* and *Thorney*, had ordered the repairs; and the ship was debited, *generally*, in the plaintiff's books: no mention whatever was made of the name of *Tinkler*, but the names of *Wilkinson* and *Thorney*, the other partners, appeared specifically.

The plaintiff's counsel, after having proved the repairs done, and that *Tinkler* had on several occasions acted as a part owner, rested their case here. The defendant's counsel then proposed to shew, that *Tinkler* had never personally con-


cerned himself in ordering the repairs, and that *Wilkinson* and *Thorney* were the managing owners. They proposed likewise to give in evidence personal directions by *Tinkler* to *Wilkinson* and *Thorney*, by which he discharged them from acting as managing owners for the future; directing them not to pledge his credit for any repairs; adding, that he would not be answerable for any which they might order in the joint name.

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Littledale and *Williams*, for the plaintiff, objected to the admission of this evidence.

Hullock, serjeant, and *Parke*, for the defendants. Unless this evidence be admitted, how can the defendant, who is not liable upon an express undertaking, but merely as legal owner, shew that he revoked the authority of *Wilkinson* and *Thorney* to pledge his credit? This evidence is offered to shew a determination of the agency of the other two defendants, by the act of *Tinkler*, who was competent so to do.

Lord Chief Baron RICHARDS.—The plaintiff has no notice given to him that *Tinkler* had discharged the other defendants from pledging their joint credit. One partner, by the necessary relation of law, may bind the other in matters relating to their common interest. A court of equity will sometimes interfere to restrain one partner from using the name of the firm in certain transactions. But, in general, he

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Verdict for Plaintiff.

Littledale and Williams for plaintiff.

Hullock, serjeant, and Parke, for defendants.

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DOE, on the demise of BLAND, v. SMITH.

EJECTMENT for the recovery of a house, &c. which the defendant held under *Bland*. The counsel for the lessor of the plaintiff produced from the sheriff's office a writ of *feri facias* against *Smith*, at the suit of the plaintiff *Bland*. It was then proved that the writ had been executed, and the premises seized; after which an assignment from the sheriff to the plaintiff was given in evidence. The counsel for the lessor of the plaintiff rested their case here.

In an ejectment for premises, where the lessor of the plaintiff is the party in the original action in which the execution issues, he is bound not only to produce the writ of *feri facias*, under which the sheriff has sold, but likewise the judgment.

Richardson, for the defendant, contended, that as the lessor of the plaintiff was the original party in the action in which the writ of *feri facias* issued, and was the person who put the sheriff in motion, it was incumbent upon him to prove the judgment, in order to make out his legal title. *Non constat*, that there was any judgment. The writ might have been sued out wrongfully. There was an obvious distinction between the officer, and the party who employs him in a public duty. The officer may justify under the writ; but the plaintiff must go a step further, and prove the judgment.

Raine and Tindall, contra. The plaintiff, in this case, is like a common purchaser under the sheriff. He derives title through him, in the same manner as any stranger would acquire a title to

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a chattel, real or personal, bought under a sale made by the sheriff.

WOOD, Baron.—I should think that it would be enough in this action for the plaintiff to produce the writ. But I will reserve the point.

Verdict for the lessor of the plaintiff.

Raine and Tindall for the plaintiff.

Richardson, for the defendant.

This case came before the Court of K. B. at Serjeants' Inn; during the sittings there after Mich. Term, 1817;—when the Court were of opinion, that the lessor of the plaintiff was bound to produce the judgment; and they accordingly directed a nonsuit to be entered.

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ANDERSON v. SANDERSON.

ASSUMPSIT.—The wife of the defendant had bought of the plaintiff certain goods, which the defendant hawked about the country. All the articles had been obtained previous to the year 1810.

The admission of the wife, who was accustomed to conduct her husband's business, is sufficient to take the case out of the statute of limitations in an action against the husband.

The defendant pleaded the general issue, and the statute of limitations. Many acknowledgments of the wife were offered in evidence for the purpose of taking the case out of the statute. On the part of the defendant it was objected, that the wife could only be considered as the agent of her husband; and that the admissions of the agent could only bind the principal, if made at the time when the goods were ordered or received by him. That, since the last receipt of goods was more than six years before the action was brought, the only admission which, upon the principle above stated, could be given in evidence, was likewise before that time; and, therefore, that there could be no authority in the wife to make an admission which would take the case out of the statute.

RICHARDS, C. B.—The wife was the only person accustomed to purchase goods at all. She was, therefore, the only proper person to ask for mo-

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ney, and to make admissions on the subject as to the sum due.

Verdict for plaintiff.

Starkie, for plaintiff.

Williams and Gilby, for defendant.

See *Gregory v. Parker*, 1 Campb. 394.

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REX v. WILLIAM MEADE and ROBERT MEADE.

THE prisoners were indicted on Lord *Ellenborough's* act for cutting and maiming certain persons, assisting a sheriff's officer, who had a warrant directing him to arrest *William Meade*, on mesne process out of K. B.

In an indictment under Lord *Ellenborough's* act for cutting and maiming a sheriff's officer, it is incumbent on the prosecutor, not only to produce the warrant made out by the sheriff to the officer, but likewise the writ.

The warrant was first put in and proved. It was directed to one *Meadley*, a sheriff's officer, residing at *Whitby*. The arrest was made at *Stainton Dale*, which was proved to be in the liberty of *Pickering Lyth*. And it appeared that a Mr. *Hill*, who was lord of the manor, and chief bailiff of the liberty, had the sole right of executing writs within the liberty.

The writ was not produced.

Upon this it was objected—1. That the prosecutors were bound to produce the writ. The sheriff was only a ministerial officer of the court above, and the bailiff was merely his servant. The warrant could not put the bailiff in any better situation than the sheriff himself would be placed in, if he had executed the process; and it is perfectly clear that his own warrant could confer no additional authority upon him; and that, if in such case an action were brought against him for false imprisonment, he would be obliged to set out the writ in his plea of justification. 2. That

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the officer had taken upon him to make an arrest *where* the sheriff had no authority to execute process at all. 3. There was no evidence that there was a *non omittas* clause in the writ. If there were not a *non omittas* clause, the arrest ought to have been made by the chief bailiff of the liberty, or his officers.

Wood, Baron, was of opinion, that there was a failure in proof of authority on both these grounds; and the prisoners were acquitted accordingly.

Tindall and Starkie for the prosecution.

Gilby, for the prisoners.

See *Rex v. Akenhead*, *ante*, case.—See likewise *Rex v. 469*, and the note to that *Prickett*, 3 Campb. 68.

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DURHAM.

DURHAM ASSIZES, 1817.

REX v. ROBINSON.

THE prisoner was indicted upon the statute of 26 Geo. III. c. 19. for plundering a vessel which was wrecked. On the 29th of *December*, 1816, the brig *Anne* was stranded near *Shields*. The prisoner, with two other persons, went by night to the vessel, whilst she was lying upon the sands, and cut down part of her rigging and furniture. There were two counts in the indictment. In the first count the property of the ship was laid in persons who were therein named; and the second count laid the property to be in persons unknown. On the part of the prosecution, evidence was offered of the ownership of the vessel as laid in the indictment; but the witness could not recollect the Christian names of some of the owners. The counsel then relied on the second count, which laid the property to be in persons *unknown*. There was a provision in the act of parliament, that a prisoner might be convicted, where the names of the owners could not be ascertained.

Where property is stated in one count to belong to certain persons, naming them specifically, but in another count to belong to persons unknown, and the prosecutor, by defect of evidence, cannot prove the names of the persons as described in the first count, he cannot recur to the second count, which describes the property as belonging to persons unknown.

Williams, for the prisoner.—Evidence of owner-

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ship might have been easily given. The present case cannot be within the meaning of the clause in the act of the 26th Geo. III. This vessel cannot be said to be the property of persons unknown.

RICHARDS, Lord C. B.—I think the prisoner must be acquitted. The owners, it appears, are known; but the evidence is defective on this point. How can I say that the owners are unknown. I remember a case at *Chester* before Lord *Kenyon*, where the property was laid as belonging to a person unknown; but, upon the trial, it was clear that the owner was known, and might easily have been ascertained by the prosecutor. Lord *Kenyon* directed an acquittal.

Prisoner acquitted.

Losh and *Grey* for the prosecution.

Williams for the prisoner.

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REX v. JOHN WILSON.

Aug. 3.

THE prisoner was indicted for uttering forged notes, knowing them to be forged. There was nothing particular in the immediate act of uttering; and the question was, as to the prisoner's knowledge. An accomplice was the principal witness; and to confirm his evidence, the counsel for the prosecution produced the prisoner's examination before the Magistrate who committed him. It was not tendered as a confession, but as containing facts which appeared upon the prisoner's examination, confirmatory of the testimony of the accomplice. The magistrate being examined, stated, that he held out no hopes or inducement to the prisoner, employed no threats, but that he had examined him at a considerable extent, in the same manner as he was accustomed to examine a witness. The prisoner, however, was not sworn.

The examination of a prisoner before a magistrate, who examines such prisoner as a witness, although he holds out no threat or inducement, cannot be used against him.

RICHARDS, Lord C. B.—I think I am not at liberty to suffer this examination to be read. No matter whether a prisoner be sworn or not. An examination of itself imposes an obligation to speak the truth. If a prisoner will confess, let him do so voluntarily. Ask him what he has to say? But it is irregular in a magistrate to examine a prisoner in the same manner as a wit-

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ness is examined. I must reject this examination.

The prisoner was acquitted.

Raine and Williams, for the prosecution.

The examination of a prisoner ought to be without oath. Bull. N. P. 242. And the whole of the confession must be taken together, when it is offered in evidence. But if only the material parts of the confession are taken down in writing, and they are afterwards read over in the presence of the prisoner, and by him admitted to be true, that admission will make them evidence. 4 Esp. 171. It has been determined by all the Judges that, although confessions, improperly obtained, are not admissible, yet that any facts which had been brought to light in consequence of such confessions may be properly received in evidence. Thus, where a prisoner was charged, as accessory after the fact, with having received property, knowing it to be stolen, proof was admitted of the property being found concealed in the prisoner's lodgings, although the knowledge of that fact had been gained from an inadmis-

sible confession, 1 Leach, 300, *Warwickshall's* case. Some, indeed, have thought, that the circumstance of the fact being known in consequence of information received from the prisoner, ought not to be shewn at the trial. But a different practice appears to be established by later authorities; and, on a prosecution for receiving stolen goods, evidence has been admitted, that the prisoner described the place where the goods were concealed, and that afterwards they had been found there; but that part of the confession in which he acknowledged that he himself had concealed them must be rejected, as it was improperly drawn from him, 2 East. Pl. Cr. 658. There is good reason for this distinction: for what the prisoner has said, respecting the concealment of the property, is ascertained to be true by the fact of discovery; but the other part of the confession, in which he charges himself with having concealed

it, may have been made untruly, and entirely under the influence of the threat or promise. See *Phillips* on Evidence, p. 52.

The extent to which an examination is to be admitted, appears by the following Case:

York Spring Assizes, 1814.

REX v. FORBES.

Indictment for murder. The deposition of the deceased was offered in evidence. The constable who produced it said, that the prisoner was not present until a *certain part* of the deposition, distinguished by a cross, at which period he was introduced, and heard the remaining part of the examination. When it was concluded, the whole of the depositions was read over to the prisoner, that is to say, both the matter preceding and subsequent to the mark.

Hardy, for the prisoner, objected to the reading of any part.

Chambre, Justice.—The intention of the statute of *Philip* and *Mary* is sufficiently plain. It is, that the prisoner shall be present whilst the witness actually delivers his testimony; so that he may know the precise words he uses, and observe throughout the manner and demeanour with which

he gives his testimony. I shall not admit that part of the deposition previous to the mark which was unheard by the prisoner; but that subsequent to the mark may be read.

Sykes, for the prosecution.

Hardy, for the prisoner.

Justices of the Peace are enabled and directed to take the depositions of witnesses in cases of felony, by the statutes 1 and 2 *Ph.* and *M. c.* 13. s. 4.; and 2 and 3 *Ph.* and *M. c.* 10. 1 *Hale*, Pl. Cr. 305. *Kel.* 19. *Paine's* case. 1 *Salk.* 281, *Woodcock's* case. 2 *Leach*, Cr. C. 565. By the first of these statutes, "Justices of the Peace, when any person is brought before them for manslaughter or felony, or suspicion of manslaughter or felony, being bailable by law, shall before any bailment, take the examination of the prisoner, and the examination of them who bring him, of the fact and circumstances thereof, and the same, or as much as may be material to prove the felony, shall put in writing before they make the bailment; which examination, with the bailment, the said justices shall certify at the next general gaol delivery, to be holden within the limits of their commission."

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As this statute extended only to bailable felonies, and not to cases where the justice committed a prisoner on suspicion of manslaughter or felony, in which cases, however, the examination of the prisoner and of those who brought him before the magistrate, was more necessary than where the prisoner was bailed; it was, therefore, enacted by statute 2 and 3 Ph. and M. c. 10. "that the justice, before he shall commit a prisoner brought before him on suspicion of manslaughter or felony, shall take the examination of the prisoner, and the information of those who bring him, of the fact and circumstance thereof, and shall put the same, or as much thereof as shall be material to prove the felony, in writing, within two days after the said examination; and the same shall certify in such form and at such time as they ought to do, if such prisoner so committed had been bailed."

In the construction of these statutes, it seems now to be settled, Hawk. Pl. Cr. b. 2. c.

46. s. 15. that the depositions of a witness, taken upon oath, in the presence of a prisoner who has been brought before the magistrate on a charge of felony, may be given in evidence on the trial of an indictment for the same felony, if it be proved on oath, to the satisfaction of the Court, that the informant is dead, or not able to travel, or that he is kept away by the means and contrivance of the prisoner. 1 Hale, Pl. Cr. 305 and 586; and 2 Hale, Pl. Cr. 52. 1 Leach, Cr. C. 14. 2 Leach, 96. *Rex v. Paine*. 5 Mod. 163. and 3 T. R. 723. Provided also, that the depositions offered in evidence are proved to be the same as sworn before the justice, without any alteration. Before the statute of *Philip and Mary*, a deposition taken before a justice of the county, where a felony was committed, would not have been evidence, even though the witness had died, or was unable to travel. See *Phillips on Evidence*, 162; and *Rex v. Smith*, post.

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HUMBLE v. HUNT and Others.

THIS was an action for the disturbance of common, by making waggon ways, &c. The defendants contended that, notwithstanding the plaintiff's right of common, the lessees of the Bishop of *Durham*, under whose rights they protected themselves, had been in the constant practice of granting leases of way-leaves, &c. In order to prove the lease upon which the question arose, the defendant's counsel produced a lease granted by the bishop of *Durham* in 1724. It was contained in a book which was kept in the office of the auditor of the bishop, and was called the Enrolment Book. The witness who produced the book, stated the custom in that office to be, that when leases were granted, an original and a counterpart were executed. The original, after the counterpart was made and copied into the enrolment book, was delivered to the lessee. The counterpart executed by the tenant was lost, and the original lease was not produced.

A book in which leases were enrolled, and which was kept in the office of the auditor of the bishop of *Durham*, (such officer holding a patent office in the county palatine) held to be admissible evidence to sustain the claims of a lessee of the bishop of *Durham*, the original and counterpart of the lease being lost.

Hullock, serjeant, for the plaintiff, objected that this book, being of a private nature, was not admissible evidence. It was in the custody of the bishop who claimed the right; and it was produced in order to make out the title of the person producing it. Could it be said, therefore, to come from an unsuspected custody. The office of the auditor was not a public office. The public could

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not, as matter of right, search at this office ; a mandamus would not lie to the auditor to produce the book in question. It was not, therefore, within the analogy of the court rolls of a manor ; nor did the office of auditor resemble that of the steward of a manor. The book itself was a mere register or index to the bishop's leases, and could not in any sense be regarded as a public muniment.

Topping and Scarlett, contra. The bishop was not to be regarded as a private individual. The right of his see invested him with a public character. He was obliged to have an auditor and an enrolment office ; and the auditor was a patent officer, recognized in the county palatine as such. All deeds relating to the rights of the bishopric were here kept ; and no persons interested in any documents were prohibited from consulting them.

Wood, Baron. I consider this book as a public muniment. Search has been made for the counterpart, but it has not been found ; the next best evidence, therefore, is the enrolment. This office is conducted like a public office ; the auditor is a patent officer ; the practice has always been to enrol leases, and I will presume this to be a correct copy.

Hullock, serjeant, Brougham, and Tindall, for the plaintiff.

Topping, Scarlett, Richardson, and Grey, for the defendants.

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HAY and Another v. MONKHOUSE and Another.

THIS was an action for money had and received. The plaintiffs were the assignees of one *Mathews*, a bankrupt; and the question turned upon the clause of the statute of James I. relating to reputed ownership. *Mathews* was indebted to the defendants in a large sum of money; and, previous to his bankruptcy, had assigned to a Mr. *Fairbain*, in trust for the bankrupts, a vessel called the *Dolphin*. The debt was to be paid by instalments. Upon the assignment of the vessel, the proper forms of transfer were gone through at the custom-house; and the vessel was registered *de novo*, in the name of *Fairbain*, and *Mathews* continued in possession of the vessel until the 25th March 1816. But a certificate of registry in *Fairbain's* name was put on board the ship. *Mathews* had engaged the captain of the vessel, and acted throughout as managing owner. From the period of the assignment to *Fairbain* (which was by the way of mortgage) and bore date the 22d December 1815, the vessel had made three voyages under the controul of *Mathews*. The first was to *Rouen* in *January*, when the certificate of registry in *Fairbain's* name was on board of her. The captain who navigated her to *Rouen* had been engaged by *Mathews*, and went out of his employ in the month of *March* 1816. *Mathews* then engaged another captain; and sent the vessel with a cargo of coals to *Topsham* in *Devon-*

A. being indebted to *B.* assigns a ship to *C.* as a trustee for *B.* by way of mortgage. The ship is registered *de novo*, in the name of *C.* and a certificate of registry is put on board; but she is left under the controul of *A.*, who becomes a bankrupt.
Q. If she passes to his assignees under the statute of 1 Jac. 1. c. 19?

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shire, where he received the cargo on the 15th of *April*. The vessel was then chartered by *Mathews* on a voyage to *Cardiff*, and thence to *London*. In the month of *June* the vessel returned to *Newcastle*; and was taken possession of by *Fairbain*, in trust for the defendants. A person of the name of *Gilly* was then the captain, who applied to *Fairbain* for money due to him upon the voyage from *Cardiff* to *London*. *Fairbain* said that he had nothing to do with the vessel at that time, and would not pay any charges of the voyage. *Mathews* had committed an act of bankruptcy in *January* 1816, to which time the commission referred.

Hullock, serjeant, and *Tindall*, for the plaintiffs, relied on *Mair v. Glennie*, 4 Maule and Selw. 240; in which it was laid down, that a transfer of a ship and cargo at sea, conveyed by *M.* to *S.* as security for money borrowed, by executing and delivering to *S.* a bill of sale of the ship, &c. was held not to pass the property to *S.*, where *S.* neglected, upon the ship's return to port, and notice thereof, to take possession, or to do any act to notify the transfer of the property to him; but that the property passed to the assignees of *M.* by virtue of 21 James I. c. 19.

Scarlett and *Richardson*, *contra*, distinguished this case from *Mair v. Glennie*. The certificate of registry was on board the *Dolphin*; all the forms of transfer were regularly gone through at the custom-house. The legal title was taken by *Fairbain* as trustee for the defendants; and

Mathews merely continued to act as agent for them. His controul, order, and disposition, over the ship were not, therefore, of that nature which gave reputation of ownership. If any man had enquired at the custom-house of the port where the ship was registered, they would have learned that *Mathews* had parted with his interest.

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WOOD, Baron. I think this a point of very great importance. I will reserve it, and the best way will be to put it into a case.

Verdict for the plaintiffs, subject to the decision of the Court upon the case.

Hullock, serjeant, and *Tindall*, for the plaintiffs.

Scarlett and *Richardson* for the defendants.

The Registry Acts are a part of the public policy of the state; and, though they have sometimes introduced much perplexity in questions of title to shipping, and have thereby been employed to supersede equity by the formalities of the law, they are nevertheless very properly maintained as the basis of the navigation of the country.

But in all questions upon them, the courts have never lost sight of their original pur-

pose, and have never given them a larger authority than what belongs to them with reference to this effect. The law requires a compliance with the general provisions of them, in order to constitute a perfect title to ships; and that all these formalities may be duly observed, it annuls a contract in which any of the more substantial are wanting. In this respect, indeed, as in most others, the Registry Acts bear a strong analogy to the Stamp

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Acts. The strict observance of the stamp acts is enforced for the purposes of revenue. The strict observance of all the forms of registration, as respects shipping, is required for the great maritime interests of the country. But in both cases these formalities are merely modes of title. They in no respect alter the nature of a contract.

In the above case, if the law had required a mere simple transfer, an ordinary act of alienation, there would have been no difficulty. Possession, order, and controul, would justify the legal presumption of reputed ownership; and, under that interpretation, the construction of the bankrupt laws would have given the property to the assignees. The question, therefore, here simply is, whether the superinduction of the formalities of the registry act have so altered the nature of the contract, as to take the possession of the property out of the cases of reputed ownership under the bankrupt laws. Or whether, as we have observed, they are mere forms prescribed by public policy for such contracts, and in no degree alter the essential nature of such dealings. Vide case, *postea*, in this Note.

A short review of the Registry Acts may be of use. They are so frequently brought into discussion in courts of justice, and are in themselves attended with so much difficulty, that it may not be impertinent to our purpose to classify and distribute them:

All merchant ships, whether employed in country trade or distant voyages (with certain exceptions as to bulk and built, which the Acts specify with sufficient clearness,) are required to be registered in the manner prescribed by the 26th Geo. III. c. 60. And by the 17th section of the same statute it is enacted that, when the property in any vessel belonging to any of his Majesty's subjects shall be transferred to any *other* of his Majesty's subjects, in *whole* or part, the certificate of the registry of such vessel shall be truly and accurately recited in words at length in the bill of sale thereof; and otherwise such bill of sale shall be void, to all intents and purposes.

The words of this section are general; and extend to all transfers of property in a ship to a British subject, whether the ship be in port, or at sea.

Thus, in *Rolleston v. Hibbert* and Others, 3 T. R. 406,

where it appeared that *A.* being indebted to the defendants in a large sum of money, gave them his promissory note for three months, and as a security executed to them a bill of sale of a ship *then at sea*: the bill of sale was absolute on the face of it; but it did not contain a recital of the certificate of registry as required by the Acts. At the time when *A.* deposited this bill of sale with the defendants, he took from them a counter acknowledgment in writing, in which they promised to return the said bill of sale upon payment of the note. But *A.* had committed an act of bankruptcy before the note had become due. Upon the arrival of the ship in England the defendants took possession of her. There were, therefore, two questions upon this case: 1. Whether the sale was absolute, or a deposit? 2. Whether it was good as against the bankrupt laws? Upon these questions it was holden by K. B.: first, that the transaction was not a deposit, but an absolute bill of sale; and, as to the ship being at sea, it was within the words of the Registry Acts; and, therefore, those acts had not been complied with. Secondly, that the defendants had no lien on the ship, but that the

intervening bankruptcy had divested the property, which had become that of the assignees.

By the equity of the Registry Acts, which are interpreted according to their purpose, a mere clerical mistake will not vitiate the bill of sale, where the certificate is effectually the same with the recital of it. But a substantial variation will. *Rolleston v. Smith*, 4 T. R. 161. *Westerdell v. Dale*, 7 T. R. 306.

In order to remove some doubts which had arisen upon the words of the Registry Act, 26 G. III. a subsequent statute, the 34th G. III. c. 68. s. 14. was passed, by which it is required that all transfers of ships, &c. shall be made by bill of sale, or instrument in *writing*, containing such recital as is prescribed by the clause in the former act. The 17th section of the 26th Geo. III. does not require the recital of the indorsements made upon the certificate upon every successive transfer; but, by the statute 34 Geo. III. c. 68. s. 15. the contract will be void, unless such indorsements shall be made. In *Maester v. Atkins*, 5 Taunt. 381. it was decided that these statutes did not prevent a person from having a lien upon the papers deposited with him of a ship which h

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was commissioned to sell. In *Wilson v. Heather*, 5 Taunt. 642. it was adjudged, that if there be an instrument, purporting to convey the ship to a lender for a security of money, such instrument being effectually an alienation of the ship, must pursue all the forms of the Registry Acts.

This, unquestionably, is a rigour, and a great practical inconvenience to ship owners, which belongs to the personal nature of the ship, as a chattel. It certainly appears a hardship, that the smallest sum cannot be borrowed upon the most valuable vessels, without such a transfer as is required by the Registry Acts. There is likewise this further inconvenience, that, upon a contract of mortgage in respect to a British registered ship, there is no equity of redemption; and the ship becomes *absolutely* the property of the mortgagee. Neither law nor equity afford any relief in this case.

In the course of practice it must have been seen, that great embarrassment has accrued to merchants from this circumstance; and it might be worthy of consideration, whether such a departure might not be allowed, from the strictness of the Registry Acts, as would

accommodate the exigencies of the merchant without impairing the public policy of the country, upon which these statutes are founded.

But in these contracts, as in all others, though the original deed may be void by a defect in the required formalities, the injured party may have his remedy upon the equity of a collateral covenant. The case of *Kerrison v. Cole*, 8 East. 231. was a case between a mortgagor and mortgagee, under such circumstances.

It is to be observed, that the port "*to which a ship belongs*," is ascertained by statute 26 Geo. III. c. 60. s. 5. to be that "from, and to which, she shall usually trade, and at or near which the husband, or acting owner, usually resides."

The further regulations required by the Registry Acts are as follows:

The ship must manifestly be sold, either in the port to which it *belongs*, or during its *absence* from such port. In the first case, such sale must be acknowledged by an indorsement (according to the prescribed form) upon the certificate of the register, before two witnesses, expressing the place of the residence of the persons or person to whom

such transfer is made; or, if such person or persons be resident in a British factory, out of the king's dominions, the name of such factory; or, if they are resident in a foreign town or city, and are not members of a British factory, the name of such town, &c. and of the house or partnership in Great Britain or Ireland for or with whom they are agents or partners. And a copy of this indorsement must be delivered to the party to whom the transfer is made, or his agent, to the registering officer, who is required to cause an entry thereof to be indorsed on the affidavit, on which the original certificate of the registry was obtained, and to make a memorandum of the same in the book of registry, and give notice thereof to the commissioners of customs.

In the second case, namely, where the sale takes place during the *absence* of the ship from the port to which she belongs; as, in this case, an indorsement upon the certificate cannot here be immediately made, such sale must be made by a bill of sale, or other instrument in writing, and a *copy of the same* must be delivered to the proper officer; and, as in the preceding case, an entry thereof, indorsed on

the affidavit, a memorandum made in the book of register, and notice given to the commissioner of customs; and, *within ten days after the ship returns to the port to which she belongs*, an indorsement is to be made and signed by the owners, or their agents, and a copy thereof delivered as before-mentioned; otherwise the bill of sale will be void. And, as before, an entry thereof is to be indorsed, and a memorandum made.

Independently of the general public policy of these Acts the legislature seems to have added some of the particular regulations, in order to facilitate and secure contracts for shipping. Thus, the public are enabled to trace from port to port to whom the property in British ships belongs; and the interest of purchasers is perhaps not less consulted, by the *effect* of these Acts, than the great public object, that of preventing foreigners from being owners, or holding shares, in British ships.

A third state of circumstances under which a contract for the sale of a ship may be, is, when the ship-owners are resident in a country, not under the king's dominions; or, where such parties are agents for, or partners in a house, or

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partnership carrying on trade in Great Britain or Ireland, at the time when the transfer is made. In this circumstance, six months are allowed after the transfer for complying with the forms. Provided only that, within ten days after the arrival of such owners or their agents, in this kingdom, if the ship be in *any port* in this kingdom; if not, then within ten days after such ship shall so arrive, an indorsement shall be made by the owners, or their agent, and a copy delivered as before-mentioned; otherwise the bill of sale to be void; and an entry must be indorsed, and a memorandum made as before.

Through most of the forms which are required by these statutes there are two acting parties: the one, the parties in the contract; the other, the public officers. The equity of the legislature does not hold the one responsible for the acts of the other. If the parties in the contract have omitted any of the necessary forms, the contract is annulled, as the penalty of their act of omission. But if the public officers have made such omission, the contract is not thereby vacated. The distinction is, that, as respects the contracting parties, the sta-

tutes are imperative; but are directory only as respects the public officers, *Heath v. Hubbard*, 4 East. 110. *Underwood v. Miller*, 1 Taunt. 187. If the statutes have not limited the time for the performance of any act required to be done by the party, the construction of the law is, that it shall be done within a reasonable time. *Palmer v. Moson*, 2 M. and S. 43.

A registry is not a document required by the law of nations as expressive of a ship's national character. *Le Cheminant v. Pearson*, 4 Taunt. 367. Indeed, the registry acts are altogether to be considered as forms of municipal institution; and scarcely any traces of a like system are to be found in the laws of any other nation. It seems, however, as if the United States of America were about to form a maritime and navigation system upon the model of *Great Britain*. A foreign built ship, British owned, is not required to be registered. *Long v. Duff*, 2 B. and P. 209. But if a ship, registered at one port, is transferred, while at sea, to a purchaser residing at another port in this kingdom, the proper mode of perfecting the transfer within the requisitions of the Ship Register Acts is, by

a registration *de novo* in her new port. *Hubbard v. Johnstone*, 3 Taunt. 177. It is not necessary for a ship to return to her former port, in order to have a memorandum of the transfer indorsed on her certificate of registration. Nor is it necessary for the purchaser to send a copy of the bill of sale to her former port: nor to indorse a memorandum of the transfer on her certificate of registry within ten days after the ship's return to England. 3 Taunt. 177. In the great case of *Hubbard v. Johnstone*, above cited, it was said by Mr. Baron Wood, in delivering his judgment, that the property of a ship vests in the purchaser instantly upon the execution of the bill of sale, not from the time of compliance with the register acts; defensible, nevertheless, upon failure to comply with these acts. And that the Register acts, so far as they applied to defeat titles, and create forfeitures, were to be construed strictly as penal, and not liberally as remedial laws. Per Wood, Baron, and Heath, Justice. *Ibid. id.*

In *Palmer v. Moxon*, 2 M. and S. 43. it was determined by K. B. that a bill of sale of three-fourth parts of a ship, then being in the port to which

she belonged, executed by three or four joint owners, transferred the property to the vendee at the time of its execution: if, at that time, a memorandum of such transfer were indorsed on the certificate of registry, and signed by the three, and a copy of such indorsement delivered to the proper officer on the next day; and if, afterwards, within a reasonable time, the other owner executed the bill of sale, and signed the indorsement, and a copy of the indorsement, signed by the four, were left with the proper officer. Therefore where, upon a writ of *feri facias* against one of the three, the sheriff seized his share after the execution of the bill of sale and signature of the indorsement by the three, but before the delivery of the copy of such indorsement to the proper officer: it was holden, that the sheriff might abandon the seizure, and return *nulla bona*. *Palmer v. Moxon*, 2 M. and S. 43.

But in *Moss v. Charnock*, 2 East. 430. (a case not altogether to be reconciled with subsequent decisions, and more especially with the opinions of some of the Judges in *Hubbard v. Johnstone*, 3 Taunt. 177.) it was holden, that if a trader became a bankrupt be-

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tween the time of executing a bill of sale of a ship at sea to the defendant, and the time of the defendant's complying with the requisites of the registry acts, though such requisites were completed *after the act of bankruptcy*, and before the action brought, the property did not pass; but the assignees of the bankrupt might recover the possession of the ship in trover.—And see *Young v. Brandon*, 8 East. 10.

The Registry Acts are imperative upon voluntary contracts between party and party only; but are not so upon transfers which are made by the operation of law, or by causes independent of the will of the immediate parties.—Thus, assignments by Commissioners of Bankrupt to assignees under the bankrupt laws, and titles passing to executors and administrators, in case of death, may be transmitted without any of the forms required by these statutes. In the same manner, whatever falls within the scope and object of 21 Jac. I. c. 19. (as we have observed in the beginning of this note,) is exempted from these statutes. *Robinson v. Macdonnel*, K. B. Trinity Term, 56 Geo. III. Thus, in trover for a ship:—*B.* being the registered owner,

executed a bill of sale of the ship to *S.* as a security for advances, which had been made by *S.* to *B.* At the time of the execution of the bill of sale the ship was at sea;—she returned the latter end of the year 1811. *S.* did not take possession; but, in May, 1812, the ship was registered in the name of *S.* Notwithstanding this alteration, the ship continued under the controul of *B.* who ordered her out for the whale fishery, appointed the captain, and exercised all the ordinary acts of ownership. *S.* became a bankrupt; the ship returned, and shortly after *B.* became a bankrupt. The question was, whether *B.* was the ostensible owner, under the statute 21 Jac. I. c. 19. so as to give his assignees a claim to the ship. The Court were of opinion that *B.* was the ostensible owner. Selwyn's Nisi Prius, 4th ed. 1142.

The registry of itself is not evidence of property, unless it can be confirmed by some collateral circumstance, which shews that such registry has been made by the authority or adoption of the persons sought to be charged as owners. In this case it would appear, that the registry is not evidence, as a registry, to charge a person,

even *prima facie*, unless such person is directly connected with the entry, and it be shewn that he had acted, either personally, or by his agents, in the contract with which he is sought to be charged, upon the ground of such registry. *Tinkler v. Walpole*, 14 East. 226. and *Trewhella v. Rowe*, 11 East. 435.

The statutes of registration have not omitted to provide for accidents and incidents, to which this kind of chattel is peculiarly exposed. Officers, therefore, are permitted to make a registry *de novo*, under the five following circumstances:—1. Where the old certificate has been lost or mislaid, 26 Geo. III. c. 60. s. 22.—2. Where the certificate is wilfully detained by the master, 28 Geo. III. c. 34. s. 14. 34 Geo. III. c. 68. s. 19.—3. Where, after a transfer of part of the property in the same port, the owners of the part *not transferred* desire a new registry, 34 Geo. III. c. 68. s. 21.—4. Where the ship

is altered in form or burthen, 26 Geo. III. c. 60. s. 24.—

5. When any transfer of property to another port, 7 and 8 W. III. c. 22. s. 21.

It may be necessary here to add that, in order to take away all possible evasion, it is expressly prohibited to change the name of the ship, 26 Geo. III. c. 60. s. 19. See likewise 34 Geo. III. c. 68. s. 22.

We have examined this subject at some length on account of its great practical importance to merchants. The public are indebted for the greater part of these acts to the industry and ability of the late Earl of *Liverpool*, a nobleman, who, without much ostentation, has done more, as a statesman, to uphold the maritime predominance of the country, than almost any man who has preceded or followed him. The professional reader need not be informed that this subject has been most ably treated by Mr. Justice *Abbott*, in his work on Shipping.

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NEWCASTLE.

SUMMER ASSIZES, 57 GEORGE III.

August.

REX v. CHARLES SMITH.

In a trial, for murder, the deposition of the deceased should be taken in the presence of the prisoner; but if such deposition be taken in the absence of the prisoner, and be afterwards read over to the deceased, in the presence of the prisoner; and the deceased assents to the truth of it, this will make the deposition evidence against the prisoner.

THE prisoner was indicted for the murder of *Charles Stuart*, under circumstances of considerable aggravation. In order to bring the charge home to him, *Richardson* and *Grey*, for the prosecution, tendered in evidence a deposition, made by the deceased on the day after the fact was committed, before two Justices of the Peace for *Newcastle*. As to this deposition, the circumstances were as follows:—All but the three last lines of it had been written before the prisoner was present. He was then brought into the room. The deceased was re-sworn in his presence. The written part was then read over to the deceased, in the prisoner's presence, slowly and distinctly. At the conclusion he assented to the truth of it. The remaining three lines were then taken, in the presence of the prisoner, from the *mouth of* the deceased. He then made his mark.

The prisoner was asked whether he would chuse to put any questions to him, but declined to do so.

E. Alderson, for the prisoner, objected, that this

deposition was inadmissible, except as to the last three lines. If not good as a deposition, it could not be good as a dying declaration ; for the deceased was not under apprehension of death at the time, (which was admitted). Then it can only be good as a deposition under the statute of Philip and Mary. To make it so, it must be given in the prisoner's presence, that he may have power to cross-examine ; and he must first have a fair opportunity to do so. Now, in order to do that, he ought to have seen the deceased examined, that he might, with his own eyes, judge of the manner in which he gave his testimony ; that he might observe in what parts the deceased doubted, and where his memory was not so accurate.— This is not obtained by a mere reading over of the deposition to the deceased after it was ready *cut and dried*. And, as to his assent at the conclusion, it could not weigh much in the case. Besides, leading questions might have been put, and improper means employed in the prisoner's absence, on which the written part might depend. The statute, he contended, ought to be construed strictly.

But RICHARDS, C. B. thought the whole deposition admissible. He observed, that the statute did not mention the prisoner's presence at all. Undoubtedly, however, the decisions established the point, that the prisoner ought to be present, that he might cross-examine. But here he had that advantage offered him, and omitted to use it. The deceased was re-sworn in his presence, and re-asserted what he had before said, by assenting

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to the deposition when slowly read over to him.
—The case of *Rex v. Radbourne*, Leach Cro. Cases, pag. 512, was in point.

The prisoner was convicted, and left for execution, on *Monday*, the 18th of *August*, at *Newcastle*. At *Carlisle*, on *Saturday*, *August* the 16th, *Alderson* mentioned to *Richards*, C. B. the case of *Rex v. Forbes*, at *York Spring Ass.* 1814, upon reading a note of which the Chief Baron sent an express to respite the execution, in order to give time to take the opinion of the twelve Judges on the point of law.

Richardson and *Grey* for the prosecution.

E. Alderson for the prisoner.

The prisoner was afterwards executed.

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CARLISLE.

SUMMER ASSIZES, 57 GEORGE III.

HARTLEY v. HARRIMAN.

CASE—That defendant's dog bit, chased, worried, and killed plaintiff's sheep. It was stated in both counts that defendant knew the said dog to be accustomed to bite, worry, and kill sheep. Plea, not guilty.

There was no evidence that the dog had *previously* chased and worried sheep, &c. but there was some general evidence that the dog was fierce and mischievous, and that he had once before attacked a man, but had not bitten him.

Topping and *Williams*, for defendant.—It is necessary to prove that the dog had the particular *vice* mentioned in the declaration ; namely, that he was accustomed to bite sheep, and that the defendant, knowing that the dog had this vice, kept him. The plaintiff had relied in his declaration on this specific vice. He has not stated that the dog was generally vicious. He ascribes his injury to *that* particular vice in the dog which he has selected, and has founded his case upon it. He must, there-

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In an action for keeping a dog accustomed to worry, and which had worried plaintiff's sheep, it is not necessary to prove that the dog had previously worried sheep. If the dog be proved to be generally mischievous it will be sufficient. And the declaration need not be special.
Sed quære.
1 Lord Ray-
mond, 110.

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fore, prove it ; or the rules of pleading mean nothing.

Scarlett and Littledale, for the plaintiff.—It is enough that the dog is proved to be generally mischievous, and is known to be so to the defendant. If a man keep any dog of a vicious disposition, he keeps him at his own peril. They cited 1 Lord Raymond, 110. where it is said, that if a man keeps a dog which bites sheep, and he has notice of it, and afterwards the dog bites a mare, an action lies.

WOOD, Baron.—I accede to the authority of that case. If you prove that the dog had vices of any kind, injurious to the person or property of others, and that the defendant was acquainted with it, it will be sufficient. I shall not require evidence that this dog had worried sheep before the time in question. If he be generally mischievous, the defendant, knowing him to be so, keeps him at his peril. The declaration is, I think, sufficient ; and the plaintiff is not compelled to prove that the dog had vices of the kind imputed to him in this record.

Verdict for the plaintiff.

Scarlett and Littledale for plaintiff.

Topping and Williams for defendant.

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LANCASTER.

 LANCASTER SUMMER ASSIZES, 57 GEORGE III.

RHODES and Another v. AINSWORTH.

THIS was an issue.—There had been a contest between the inhabitants of *Milne Row*, which was an ancient chapelry in the parish of *Rochdale*, with respect to their liability to repair the parish church. Proceedings had been taken in the Ecclesiastical Courts.—A prohibition was obtained in K. B. and an issue was directed to try the custom.

It is an objection to the competency of a witness, who comes to discharge certain premises from a rate, that he has property of the kind in question, in the occupation of a tenant, subject to such rate, if established: and therefore his own reversionary interest may be affected thereby.

At the trial, on the part of the plaintiffs, an old witness of the name of *Abraham Mills* was called. He lived in *Yorkshire*, but had property in *Milne Row*: this property was on lease to a tenant, who had covenanted by his lease to pay all rates, taxes, and charges which were assessed, and might be imposed upon the tenement.

Scarlett and *Richardson* objected, that this witness, who was called to shew that the inhabitants of the chapelry were not liable, was not a competent witness. He had an interest in the result.

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Topping, Littledale, and Williams, contra.—He has no existing interest. He may never have an interest. He is not rated; the rate is not upon the premises, but upon the occupier. He is no occupier. If the verdict be against the plaintiffs, and the rate is due, *Mills'* tenant must pay it. If the verdict be for the plaintiffs, how is his situation altered? He may die before he becomes an occupier, or may never occupy at all. 2 East. 559. and 54 Geo. III. (*per Sir Egerton Brydges' Act*).

WOOD, Baron.—I think this witness is not competent. Although he has no interest *in presenti*, that is to say, though there will be no direct charge upon himself, yet his tenant may be obliged to pay;—and will not he, therefore, as owner of the fee, have his estate permanently burthened by this incumbrance brought upon it? He has property in the chapelry which may be affected in its value by the event; although he is not interested at the present moment by having been already rated.

Nonsuit.

Topping, Littledale, and Williams, for plaintiffs.

Scarlett and Richardson for defendant.

Topping moved to set aside the nonsuit in the next term; but the Court agreed with the ruling of the learned Judge.

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HODGSON v. SCARLETT, Esq.

THIS was an action for defamation. The plaintiff was an attorney, and the defendant a gentleman at the bar. There were two counts in the declaration; and the words in the first count, which were charged to have been spoken by the defendant of the plaintiff in the trial of a cause at the Spring Assizes for *Lancaster*, 1817, were as follows:—"Some actions are founded in folly, some, in knavery, and some in both: some in the folly of the attorney; some in the folly and knavery of the parties. Mr. *Peter Hodgson*, (meaning the plaintiff,) was the attorney for the parties, and drew the promissory note fraudulently; got *Beaumont* to pay into his hands 150*l.* for the benefit of the plaintiff. This was one of the most profligate things I ever knew done by a professional man."—There was a second count in which the words charged were these:—"Mr. *Hodgson*, (meaning the plaintiff,) is a fraudulent and wicked attorney." The defendant pleaded the general issue.

No action can be maintained against a counsel, for words spoken in a judicial proceeding, provided they are pertinent to the cause, and that no malice against the individual who is the subject of the words, be proved against him.

Raine, for the plaintiff, stated, that the words were spoken of the plaintiff by the defendant in his character as *counsel*: that the plaintiff had been engaged as attorney, in a transaction which was the subject of a suit at the Spring Assizes for the county of *Lancaster*, 1817, in which Mr. *Scarlett*, as counsel for the defendant, spoke the words contained in the declaration. He then pro-

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posed to prove, 1st, That the words were spoken.
2nd, That they were totally unfounded.

Mr. Baron *Wood* asked Mr. *Raine*, if he could mention any action of the same kind, or upon what principle the present action was maintained.

The plaintiff's counsel stating, that they believed the action to be *primæ impressionis*.

Mr. Baron *Wood*.—It appears to me, that no action can be maintained for words spoken in judicial proceedings. I take it for granted that there was such a cause as the one alluded to tried here at the Spring Assizes; that there was a question in it concerning the drawing of a promissory note; that the words charged to have been spoken had reference to that transaction, and were addressed to the plaintiff by the defendant as observation in the cause. If so, although the words might be too severe, (of which I will say nothing,) if they were, notwithstanding, relative to the subject matter of the cause, I am of opinion that no action can be maintained. I will admit that there must be some limits to the privilege of speech at the bar; but it is difficult to draw a line. A case may occur where an action like the present would be maintainable: for instance, if a counsel should stop short in his speech, and call a man a rascal or a scoundrel, and should introduce any coarse slander, not relevant to the matter in issue, I should not say that the action, in such case, would not be maintainable. It is necessary to the due administration of justice, that counsel should be protected in the execution

of their duty in court ; and that observations made in the due discharge of that duty should not be deemed actionable. But counsel are not, therefore, protected in making any slanderous reflections out of court. They would be answerable for such reflections, if calumnious, upon the principle of Lord *Abingdon's* case. But I have always considered it to be an established principle in law, that for imputed slander, originating in judicial proceedings *in court*, no action will lie. Being of opinion, therefore, that the words were pertinent to the subject matter of discussion, and that it would be improper that the Jury, under such circumstances, should try whether they were well or ill founded, I am ready to pronounce that the plaintiff cannot maintain this action. If it were encouraged, where should we establish any limits? The business of one assize would be to try actions for words spoken at a former.

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Plaintiff nonsuited.

Raine and *Richardson* for the plaintiff.

Topping, *Hullock* serjeant, and *Littledale*, for the defendant.

In the next term, *Raine* obtained a rule *nisi*, to shew cause why there should not be a new trial.—Cause was shewn against the rule at Serjeants' Inn on the 22d. of *January*, 1818.—The judges delivered their opinions *seriatim*.

Lord *Ellenborough*, in deli-

vering his judgment, said, that the law privileged a master, in making communications respecting the character of his servant, which, however calumnious, could not be the subject of an action, if such communication were made *bonâ fide*, and without malice.

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This privilege was absolutely necessary for the common convenience of mankind. The privilege of counsel was subject to the same observation. An advocate was entitled to use the information communicated to him by his client, in a fair and *bonâ fide* exposition of the merits of the case submitted to his conduct: he was privileged in commenting on the case, and making observations upon the instruments or agents by whom the case was brought into court. This privilege belonged to him, and might be exercised with a large and liberal freedom. In this point of view, it was necessary to consider the situation of the person who was the subject of the observations which formed the ground of this action. The plaintiff was not only the attorney in the original cause, but he was mixed up with all the facts of the case, and was the sole instrument in the concoction of the merits of the question *then* before the court. It was proved that he was the instrument in drawing the promissory note, as a security for the due application of the proceeds of the ship, when they should be forthcoming: he, therefore, was most cognizant of the merits and circumstances of the case: and he knew, as

a professional man, that there was no ground for the action. In commenting upon this case, and the particular situation in which the plaintiff, (Mr. *Hodgson*,) stood, the learned counsel said, "he was a fraudulent and wicked attorney." He had a right to comment upon him, for he could not comment upon all the circumstances of the case in their proper light, without adverting to him as the instrument which put the action in motion, and as the manufacturer of all the information upon which the action was founded. So far, then, as the circumstances of this case went, it did not appear that the learned counsel had attacked the plaintiff *at random*, or had gone out of his way for the purpose of slandering his character. In the natural order of things he must comment upon the transaction as it appeared in evidence. As Mr. *Hodgson* was the agent in the transaction, what was the effect of that circumstance? Why, it stripped the plaintiff, in that case, of all right to maintain his action. The learned counsel, adverting to the instrumentality of Mr. *Hodgson* in the transaction, called him "a fraudulent and wicked attorney." Perhaps, (Lord *Ellenborough*),

should say that, strictly speaking, Mr. *Hodgson* could not be pronounced guilty of fraud, as between man and man: but there certainly was a degree of wickedness *in foro divino*, in bringing forward such an action. That it was clearly proved, that the words were relevant to the matter in issue; and therefore his Lordship thought the action not maintainable.

Mr. Just. *Bayley* was of the same opinion; and he thought that the rule applicable to this case was rightly laid down, *Brooke v. Sir Henry Montague*, Cro. Jac. 90. "that a counsellor in law, retained, hath a privilege to enforce any thing which is informed unto him for his client, and to give it in evidence, it being *pertinent* to the matter in question, and not to examine whether it be true or false; but it is at the peril of him who informs it. For a counsellor is at his peril to give in evidence that which his client informs him, *being pertinent* to the matter in question. Otherwise, an action upon the case lies against him by his client, as *Popham* said; and, although it be false, he is excusable, being pertinent to the matter."—As to the question of pertinency in this case, the learned Judge

was of opinion, that the facts of the former trial *clearly justified the words upon that ground*: and, even supposing that those facts had gone to the Jury, it was difficult to imagine how a different conclusion could be drawn. Admitting that the expressions were harsh; yet, under all the circumstances of the case, they were no more than counsel was privileged in using, as pertinent to the matter in issue.

Mr. Justice *Abbott* said, that the rule for determining whether this action was maintainable against a barrister, must be governed by the pertinency of the words to the matter in issue. Here the pertinency of the expressions were manifest; and as there was no malicious motive imputable to the defendant, the action was not maintainable. No advantage could be derived from sending this case to a new trial, as the result must and ought to be the same.

Mr. Justice *Holroyd* was of the same opinion. He considered the privilege of speech in counsel of the same extent as that which belonged to the party whom he represented. His right to exercise it was founded in the duty of the trust reposed in him. Greater latitude was undoubtedly allowed

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in practice to the party himself than to his advocate; but this was merely because the latter, from his knowledge and experience, must be restrained more strictly to the pertinence of his observations. With respect to the privilege of the party himself, the learned Judge cited 1 Hawk. c. 73. s. 8. 1 Rol. 87. Pl. 4. *Lake v. King*, 1 Saunders, 132. and 4 Co. 14 B.; and from these authorities, he said, that an argument was to be derived as well in favour of counsel, as of the party, in the exercise of this his undoubted privilege.—His opinion in this case was governed; first, on the ground of the pertinency of the words to the matter in issue; and, secondly, that no malice was proved.

Per Curiam.—Rule discharged.

After the judgment of the court in this case, it may seem almost unnecessary to add any thing else, in illustration of the right claimed by counsel, and hitherto always exercised, to speak, with the most unrestrained freedom, upon all subjects connected with the case before them; confining themselves only, (if upon statement,) to matters pertinent to

the subject on trial; or, if in the expression of feeling, to such terms as are natural and proper to the occasion. The right is so simple, and, indeed, so manifest, that a sufficient reason for it is almost included in the above description of what it is. The counsel for a party is the legal substitute for that party himself.—As far as respects the subject before the court, such counsel is presumed to be invested with the whole person and case of his client. Whatever, therefore, law or reason would allow to a man pleading his own cause, whether in statement, or in the expression of natural feeling, belongs, in the same extent, to the counsel who represents him. Without such latitude, a counsel would be a very imperfect and inadequate representative of his client. The principle, therefore, belongs to natural justice as well as to law. It is a part of the necessary means to enable counsel to make as full and sufficient a defence as could be made by the party himself. Nor, on the other hand, is there any injury in the extravagance natural to a counsel or his client, under these circumstances. It goes forth only as an *ex parte* statement. It is *given* as such, and *received* as such; and the

due allowance is always made. Whatever excess there may be in it, is amended by the same liberty allowed to the opposite Counsel in answer and defence, or by the correction of the Judge upon his observations on the evidence and the whole case. In the result, therefore, any restriction to the liberty of speech at the bar would be more injurious to the interests of public justice, than any latitude in the exercise of it (always subject to the controul of the Court) could possibly be to individual feeling and character.

Being now upon this subject, we may be permitted briefly to observe, that many popular errors have lately become current with respect to the general right of making public the proceedings of Courts of Justice. Some writers, admitting in full this privilege of speech in court, have contended for the unbounded right of publishing every thing that is transacted there; thus erroneously extending an undoubted privilege of Courts and Counsel to the printers and publishers of their proceedings. But the same reason does not exist; and, therefore, not the same privilege.

The proceedings of Courts of Justice in England are public; not, as asserted by some

writers, with any view to controul the Courts by public opinion, but simply because, in ordinary circumstances, there is no reason for secrecy; and in ordinary circumstances such publicity is a manifest good: and, therefore, has always been encouraged by the Judges of the Courts. But when the nature of a cause, or any evidence in it, however necessary it might be to the trial, may be injurious to any public interest, whether of good morals, public decency, or private feeling, it is of course within the rights of a course of justice to close its doors against all but those concerned in the cause, and necessary to its trial. Such, for example, as in trials for blasphemy, obscenity, &c. Nor will it follow in cases where the doors are open to all comers, which is the most frequent course, that any hearer may publish all that he may hear. He is still within the obligation of not using his faculties in producing any public or private mischief. The Court and Jury try what they hear, and give to evidence, and the speeches of Counsel, their proper weight. But the publication of such proceedings may very unnecessarily offend private feelings, and still more frequently, public decency. The

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trial is before men of gravity and wisdom, bound by an oath to administer justice. The publication of it goes forth to people of all ages, conditions, and passions. And still more strongly would it be a contempt of Court, and a public wrong, for any advocate employed in a cause, to publish, with a malicious and partial intention, his speech in a Court. Such speech would necessarily be an *ex parte* statement. To put it forth to the world as the whole and true case, supposing the matter to be accusation, would be a manifest libel.

The members of the two houses of parliament, by reason of their privilege, are not answerable at law for any personal reflections on individuals, contained in speeches in their respective houses. But this privilege does not extend to them, or others, in the publication of such speeches. Such publications, therefore, if containing matter of libel, are not protected. *Lord Abingdon's case*, 1 Esp. 226.

A member of the House of Commons may be convicted upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, if it contain libellous matter, although the publication be a

correct report of such speech, and be made in consequence of an incorrect publication having appeared in that and other newspapers. *Rex v. Creevey*, 1 M. and S. 273.

The principle of the case of *Rex v. Lord Abingdon*, and *Rex v. Creevey*, is this :—On account of public utility, the constitution gives unrestrained freedom of speech to the members of both houses of parliament, speaking within their respective chambers; and whatever may be there said is censurable only according to the rules of parliament, and before parliament. It is needless to say, that the reason of this is two-fold : in the first place, its public utility ; and, secondly, that it would be derogatory to the dignity of either house of parliament to be called before the inferior tribunals. But it does not therefore follow, that because a Member, for the sake of public good, may speak as he pleases in parliament, before an assembly, the established rules of which will restrain any mischievous indecorum, that he may therefore publish his speech in the shape of an *appeal* to the people ; that he may convert a parliamentary speech into a popular harangue, and carry his privilege of parliament as a shield against legal responsibility,

where the reason of such privilege totally ceases.

The privilege is not absolute, but relative; it is not personal but local; and where the reason ceases, and the condition of place does not exist, the promulgation or publication of slanderous and libellous matter (the privilege being divested with the reason and consideration of it) necessarily stands forth in its own nature, subject to the controul and punishment of law.

In a Court or Council of public Inquiry, such as are the two houses of parliament, the accusation of individuals must frequently occur. The public good requires, that there

should be no restraint beyond the rules of the House itself; and the gravity and dignity of the assembly considered, the probable mischief to an individual cannot for a moment weigh against the public good of such freedom. But the mischief would become intolerable, if a member of parliament, having any malignant passion against an individual, and having first legitimated his slander by carrying it through the House, might thereafter publish it without responsibility to the laws.

The privilege of Counsel is exactly within the same analogy, and subject to the same controuls.

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SITTINGS AT WESTMINSTER, AFTER MICHAELMAS
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Crib-biting is no such unsoundness in a horse, as to entitle a purchaser, who has bought under a *general* warranty, to maintain an action for the breach of it, upon this fault only.

ACTION upon the warranty of a horse, which had been sold for ninety guineas. The question was, whether crib-biting, which was the vice in question, was such a species of unsoundness as to sustain the action. The horse had been warranted sound generally. Some eminent veterinary surgeons were called as witnesses, who stated, that the habit of crib-biting originated in indigestion; that a horse, by this habit, wasted the *saliva* which was necessary to digest his food, and that the consequence was a gradual emaciation. But they said that they did not consider crib-biting to be an unsoundness, but that it might lead to unsoundness. That it was sometimes an indication of an incipient disease, and sometimes produced unsoundness, where it existed in any great degree.

Best and *Vaughan*, serjeants, for the defendant. This was no breach of warranty. The defendant had given no undertaking against the particular vice which was the subject of complaint. As well might it be said that kicking was an unsoundness,



because a horse might, by kicking, accidentally break a leg.

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Lens, serjeant, contra, The habit of crib-biting detracts from the value of a horse; and whatever renders a horse unfit for service, and incapacitates him for general use, is unsoundness. If it must necessarily terminate in unsoundness, it is the same thing as if the horse were actually unsound. Besides, unsoundness was a question of fact, not of law.

BURROUGH, J.—It is, perhaps, compounded of both. If it be law, I am of opinion that, in this particular case, it is not unsoundness. And I am satisfied the Jury will think with me on the fact. It is a curable vice in its first stages, and this horse was only proved to be an incipient crib-biter. It is a mere accident arising from bad management in the training of a horse, and is no more connected with unsoundness than starting and shying. The plaintiff might have demanded a warranty against this particular vice; but I am quite clear that it is not included in a general warranty.

Nonsuit.

Lens, serjeant, and Gaselee, for plaintiff.

Best and Vaughan, serjeants, for defendant.

Actions are so frequently brought upon a breach of warranty on the sale of horses, that it may be useful to collect the cases within the compass of a short note.

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Horses being subject to secret maladies, it is usual with the buyer to require a warranty of soundness upon their sale. For if a horse, having a secret malady, be sold without a warranty of soundness, the purchaser has no remedy. If, indeed, a fraud have been practised at the time of sale, the buyer may have an action on the case for the *deceit*. But unless in the case of fraud, the maxim of the English law, contrary to that which obtains in the civil law, is *caecat emptor*. An express warranty extends to latent defects. But if there be no such warranty, and the seller sell the horse, such as he believes it to be, without fraud, the law will not imply that he sold it upon any other terms than such as were stipulated at the time of the bargain. It is the fault of the buyer, if he do not insist upon a warranty. It has been said, that there is an implied warranty of the goodness of an article arising from the conditions of all sales; and this has been rested upon the principles of natural justice and equity, which must govern all the contracts of men without reference to the particular quality of the thing for which they contract. There is no such principle, however,

in the English law. *Parkinson v. Lee*, 2 East. 314. It was formerly, indeed, a current opinion, that a sound price was *per se* an implication of warranty. In other words, that a sound price given for a horse was tantamount to a warranty of soundness. But, when this notion came to be judicially examined, it was found to be so loose and unsatisfactory, and so much at variance with the principles of the English law in contracts of buying and selling, that Lord Mansfield, (in *Stuart v. Wilkins*, 1 Dougl. 18.) rejected it as a popular error; and said, that there must either be an express warranty of soundness, or fraud in the seller, in order to maintain the action. See likewise, 1 Roll. Abr. 90. P. and the judgment of Mr. Justice Lawrence, in *Parkinson v. Lee*, *supra*.

The advantage arising to the buyer from an express warranty of soundness is this, that such warranty extends to every kind of soundness, known and unknown to the seller; and if the warranty be false, the buyer has a remedy against the seller, to recover a compensation in damages. But as soon as the unsoundness is discovered, the buyer should immediately tender the horse to the

seller, for otherwise he will not be entitled to recover for the keep. *Caswell v. Coare*, 1 Taunton, 567.

A person sells a horse as of the age stated in a written pedigree, declaring that he knows nothing of the horse but that he has learnt from the pedigree. This is not a warranty. *Dunlop v. Waugh*, Peake, 123, *Kenyon*, C. J. 1792.

Where a horse has been sold, warranted sound, which it can be clearly proved was unsound at the time of the sale, the seller is liable to an action on the warranty, without either the horse being returned, or notice given of the unsoundness. *Fidler v. Starkin*, 1 H. B. 17.

In *Curtis v. Hannay*, 3 Esp. 83. Lord *Eldon* says, "I take it to be clear law, that if a person purchases a horse that is warranted, and it afterwards turns out that the horse was unsound at the time of warranty, the buyer may, if he pleases, keep the horse, and bring an action on the warranty, in which he will have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty; or he may return the horse, and bring an action to recover the full mo-

ney paid. But in the latter case, the seller has a right to expect that the horse shall be returned to him in the same state as when he was sold it; and not by any means diminished in value." A warranted article must be returned immediately; or in a reasonable time after the defect is discovered.

But where on the sale of a horse there is an express warranty by the seller, that the horse is sound, free from vice, &c. coupled with an undertaking on the part of the seller to take the horse again, and pay back the money, if on trial he shall be found to have any of the defects mentioned in the warranty, the buyer must in such case return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. *Adams v. Richards*, 2 H. B. 573. In such case, *trial* means a reasonable trial, 2 H. B. 573.

Upon the warranty of a horse as sound, the vendor, in a subsequent conversation, promised, if the horse were unsound (which he denied), that he would take it again, and return the money: though the horse be unsound, the vendee

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must sue upon the warranty, and cannot maintain assumpsit to recover back the price, for such promise does not discharge the original warranty. *Payne v. Whale*, 7 E. R. 274.

If a horse sold at a public auction be warranted sound, and six years old, and it be one of the conditions of sale that it shall be deemed sound unless returned in two days; this condition applies only to the warranty of soundness. *Buchanan v. Parnshaw*, 2 T. R. 745. Therefore, where a horse, sold with such a warranty, was discovered to be twelve years old ten days after the sale, and was then offered to the seller, who refused to take him, it was holden that an action might be maintained by the buyer against the seller, on the warranty; and his right to recover is not affected by his having sold the horse after offering him to the defendant, 2 T. R. 745. In an action on a warranty of a horse, the affirmative is, however, upon the plaintiff; he must positively prove that the horse was unsound. *Eaves v. Dixon*, 2 Taunt. 313. And see *Lewis v. Cosgrave*, 2 Taunt. 2. In the latter case, where the plaintiff sold the defendant a horse, with a warranty of soundness, and the defendant

gave the plaintiff a bill of exchange for the price; the defendant discovering the horse to be unsound, tendered him to the plaintiff, who refused to take him back again, and brought an action against the defendant on the bill, it was holden, (upon the defendant's proving that the plaintiff, at the time of the sale, *knew* that the horse was unsound) that he could not recover upon the bill, for it was clearly a fraud; and a person cannot recover the price of goods sold under a fraud.

Upon the breach of the warranty of a horse, if the horse is returned, the measure of damages is the price paid for him; if the horse is not returned, the measure of damages is the difference between his real value and the price given; if the horse is not tendered to the defendant, the plaintiff can recover no damages for the expence of his keep. *Caswell v. Coare*, 1 Taunt. 566, cited *supra*, and *Curtis v. Hannay*, 3 Esp. 83.

A horse labouring under a temporary lameness, occasioned by accident, and capable of being speedily removed, is not unsound. Therefore, an averment in a declaration of a general warranty of soundness is supported by evidence of a

warranty made with a particular exception of such temporary injury. *Gannett v. Bavis*, 2 Esp. 673. *Eyre*, C. J.

In an action upon the warranty of a horse, it is not enough that he is a *roarer*, as this may be merely a bad habit, or proceed from other causes unconnected with his general health and activity. To prove a breach of warranty, the roaring must be shewn to be symptomatic of disease or infirmity in the particular case. *Busset v. Collis*, 2 Campb. 523.

Where, by the conditions of sale, a horse is to be returned within two days if he prove unsound, he cannot be sent back after the expiration of that period, although the auctioneer may not have paid over the price to his employer. *Mesnard v. Aldridge*, 3 Esp. 271. *Kenyon*, C. J. 1801. A party, sued on a warranty of a horse, may call a prior vendor, who sold with a warranty, to prove the animal sound. *Briggs v. Crick*, 5 Esp. 99.

A warranty of the soundness of a horse sold requires

no stamp, it being an agreement "relating to the sale of goods." *Shrine v. Elmore*, 2 Campb. 407.

With respect to the form of pleading in an action on a breach of warranty, the ancient method, which was an action of tort, has long been superseded by the more convenient form of a declaration in *assumpsit*. This enables the plaintiff to add the money counts to his declaration. *Stuart v. Wilkins*, Doug. 18.

Where the contract of warranty is still *open*, the plaintiff must declare *specially* upon the warranty. He cannot recover the price of the horse in an action for money had and received. *Towers v. Barrett*, 1 T. R. 133. *Power v. Wells*, Cowp. 818. *Weston v. Downes*, Doug. 23.

It is usual to insert the warranty in a receipt for the price of the horse; and the receipt, if duly stamped with a receipt stamp, will be evidence of the warranty. An agreement stamp will not be necessary. *Shrine v. Elmore*, 2 Campb. 407. See likewise *Selw. N.P.* 4 ed. 630.

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Semble, that the patent should be a general index to the specification, and state, in substance and outline, what is thereafter set out in circumstance and detail in the specification.

2. *Semble*, that if a patent be taken for more of a machine than is strictly the inventor's own addition or improvement, it is not good.

THIS was an action for infringing the plaintiff's patent. *Hill*, it appeared, had obtained a patent for "*certain improvements in the smelting and working of iron.*" The specification, which was exceedingly complex, described the invention to consist in extracting iron from slags or scoria, which it was formerly the custom for iron masters to throw away, as useless. The plaintiff then proceeded to shew that, by an admixture of a certain proportion of mine rubbish with the slags, it was rendered fit for the process of iron making; and that by a further application of lime-stone, or quick lime, in the puddling furnace, the disease called the cold short in iron, (which was a kind of brittleness, and want of malleability,) was effectually cured; and that the iron so produced was good bar iron. The specification then described the quantities of slags, mine rubbish, and lime-stone, or quick lime, which were to be used; and likewise the particular times at which these materials were to be put into the several furnaces. There were altogether four furnaces; through all of which, for the purposes of the invention, (viz. the extracting of good marketable iron from the slags,) the several materials, at certain times, and in certain proportions, were required to pass.

It appeared that there was no novelty in the process of extracting iron from slag; that it was known amongst scientific men; and that Doctors

Aikin and Renman had mentioned this process in two well known works of science. The admixture of lime-stone, or quick lime, with slag was likewise known ; but had hitherto only been applied in the blast furnace. The plaintiff's quantities, proportions, and process, were of his own invention. But there was some doubt as to their utility.

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Lens, serjeant, for the defendant, contended, that the patent could not be supported. There was no novelty in the invention. Every part of the manufacture was known before. Minute and frivolous additions would not sustain a patent. *A fortiori*, therefore, a mere regulation of the parts of a whole manufacture, previously known, was insufficient. In the present case there was no novelty, as every thing was in the common stock before, though, from accidental circumstances, the plaintiff's process had not been commonly applied. But there were two objections which were fatal to his patent :—1. It was necessary that the patent, as well as the specification, should indicate what was claimed by the inventor. It should state in substance, and outline, what he challenges as his own ; leaving the details to be enumerated in the specification. It is the patent that gives the monopoly, and is the prohibitory grant of the crown. The specification is only required to be enrolled within six months after the patent. It is a condition subsequent. The prohibition, therefore, commences with the patent. The patent in question is for “ *certain improvements in the smelting and working of iron.*” But this is too loose and general. The plaintiff, in his specification, however, has

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inventors, like *Watt* and *Harrison*, should be rewarded by a limited exclusive possession, for the production of engines and machines, by which labour has been abridged, commerce facilitated, and national wealth increased. But can there be any public or general reason that a large capitalist, who has merely added a valve or a hinge to a steam-engine, should claim of the Crown a reward of the same extent as the original inventors? and, by means of his capital, in addition to his patent, should create a monopoly to himself? There is no proportion in the reward. Such exclusions and monopolies become incumbrances upon general trade, and a serious mischief to smaller tradesmen. Surely something might be

contrived, by which the inventors of minute, but useful, additions to manufacturing machinery, might be rewarded in proportion to their merit, without tying up the supply (frequently of the most expensive engines) in the hands of monopolists, to the injury of all mechanics in the same line, and the exorbitant increase in the price of the article.

The general principle is so good, that we are far from wishing a repeal of the statute of 21 James I. c. 3. ; but the practice of every day proves how much it requires limitation. All that seems wanting is proportion and distinction; something short of the reward, due only to the whole, for those who have only added and invented a part.—*Et pro ratâ.*

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ALLEN and Another, Assignees of PRIOR, a Bankrupt, v. IMLETT and NICHOLS.

THIS was an action of money had and received. The bankrupt, *Prior*, before his marriage, by a regular deed of settlement between himself on the one part, his intended wife on the second part, and the defendants, as trustees, on the third part, had settled some stock in the four *per cents*. (and had warranted to settle 400*l.*, being the amount of a bill of exchange, not at that time due,) in trust for *Ann Bridgen*, whom he was about to marry, until marriage; after marriage, to the use of *Prior* himself, during his life; and upon his death to his wife, &c. The stock, being vested in the name of the trustees, was received by *Prior*, before his bankruptcy, under a power of attorney from them. Since his bankruptcy, the trustees had executed a power of attorney to another person to receive it; and had paid it into a banker's, for the use of Mr. and Mrs. *Prior*. The action was brought to recover the sum of £80. 8*s.* 4*d.*, being the amount of three half yearly dividends.

No action at law will lie against trustees, either by their *cestui que trust*, or, in case of his bankruptcy, by the assignees of such *cestui que trust*.

Copley, serjeant, for the plaintiffs, contended, that if the defendants had not received the money, this action could not have been maintained; but, having received it, and paid it over wrongfully, they had no protection from their character as trustees. These dividends were the property of the bankrupt before his bankruptcy, and now be-

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came the property of the assignees. The trustees, therefore, were answerable at law for disposing of monies which the bankruptcy had vested in the plaintiffs.

Blossett, serjeant.—Defendants are trustees; and no action lies against them for an abuse of their trust at common law. If there be any redress, it must be through the medium of a court of equity. *Prior* himself, the *cestui que trust*, could not sue his trustees: neither could his assignees, who derive through him.

DALLAS, J.—I am decidedly of opinion that this action cannot be maintained. It is purely a case for a court of equity. I will nonsuit the plaintiff, and give him leave to move to set it aside.

Copley, serjeant, and *Selwyn*, for plaintiffs.

Blossett, serjeant, and *E. Lawes*, for defendants.

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SMITH v. HORNE and Others.

THIS was an action against a carrier for the loss of a quantity of gloves, of the value of £67. 9s. 6d. The gloves had been put into a parcel, and sent by a coach from *Worcester* to *London*, directed to *I Smith*, to the care of *Mr. Robinson*, Angel Inn, *Angel Street*. The carriage and booking were paid at *Worcester*. The defendants had placed the usual board of notice in their office, stating that they would not be answerable for cash, writings, or any articles whatsoever, above the value of 5*l.*, unless paid for accordingly. The plaintiff was acquainted with the terms of this notice ; but sent the parcel as a common package, giving no intimation of its value, and not paying any extra price. When the parcel arrived at the Inn, in *London*, it was put into a cart, with other parcels, to be delivered in the ordinary way. It was an open cart, in the charge of one man, who drove the cart, and likewise delivered parcels. It was in evidence that the defendants were in the habit, when the parcels were numerous, of sending two persons with the cart, to divide the labour of delivery, and to increase the safety : one remaining in the cart, whilst the other man delivered the packages. On the present occasion the parcels were few ; and the lad, who drove the cart, having a parcel to deliver in *Moorfields*, left it without any guard, at the top of an alley, along which he was not

A carrier who restricts his liability, is, notwithstanding, answerable in cases of negligence ; the degree of which is a question of fact for the Jury.

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able to drive, as a cart was unloading at the time, and stopped the way. On his return the parcel was lost out of the cart.

Vaughan, serjeant, and *Richardson*, for plaintiff. The plaintiff was not obliged to insure: he trusted to the common law liability of the carrier in cases of gross negligence, from which the accustomed restrictions upon his responsibility (which the law, without countenancing, had, notwithstanding, admitted,) did not exempt him. They contended—
 1. That this was a case of gross negligence, inasmuch as the defendants should have sent two men with the cart. 2. That the bulk of the parcel was a sufficient indication of its value, *Beck v. Evans*, 16 East. 244.

Best, serjeant, for the defendants.—Negligence of a gross kind was not proved, by shewing that every possible precaution was not taken. The plaintiff submits to a degree of risk by not insuring, and thereby he deceives the defendants. A parcel of the value of 70*l.* is thrown into the office as a common package. Although the plaintiff did not insure, some intimation should have been given of its value at the time of delivery. The bulk indicated nothing of value in this case.

DALLAS, J.—Whether the defendants have been guilty of gross negligence is a question for the Jury. The case of *Beck v. Evans* does not apply. The plaintiff had an option to insure or not; but I think he was culpable, in delivering as a common package property of this value. He lulls the de-

defendants into a false security ; for they would probably have taken more care, if they had known the value of the parcel. The question is, whether, considering the trust the plaintiff reposed in the defendants, and the risk to which, in a degree, he may be presumed to submit, (from the circumstance of his not insuring,) they have been guilty of gross negligence.

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The Jury found a verdict for the plaintiff for the value of the gloves.

Vaughan, serjeant, and *Richardson*, for plaintiff.

Best, serjeant, and *Curwood*, for defendants.

See *Gonger v. Jolly*, ante, 317 ; and the note in which the cases are collected, to which the following may be added :—

KERR v. WILLAN.

Sittings after Hilary Term, 1817, at Guildhall, and in K. B. Easter Term.

Action against a carrier, for the loss of a parcel. Notice in the common terms of restrictive liability was placed in a conspicuous situation in the defendant's office. The porter who delivered the parcel at the office, *might* have seen it in the office ; but it was not in

evidence, either that he did see it, or that he was aware of the existence of such a notice. At the trial, a verdict was found for the defendant ; and in Easter Term following, the Attorney General, (Sir *William Garrow*,) moved for a new trial.

Lord *Ellenborough*.—Much inconvenience in this case would be removed from carriers, if they distributed handbills. A messenger may come with a parcel to an office who cannot read. But, surely, any deviation from the usual contract which the law implies, ought to be announced to him.

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I admit that a special contract between the parties will supersede the law: but, then, that contract must be proved; and whether it be proved or not is a fact for the Jury; that is to say, whether there be a sufficient notice given, with reference to place, time, and person, to create a special contract between the parties. All the difficulties arise by a departure from the old law, which was acted upon for ages; and there is no doubt but it will require many struggles to get clear of the wisdom of our ancestors. But the difficulty is not insurmountable. Let carriers, when they receive parcels at their offices, furnish receipts containing the conditions upon which they contract, and deliver one for each parcel received.—This may help them.

Rule refused.

So in *Munn v. Baker*, K. B.

Guildhall, Michaelmas Term, 1817.—A notice was affixed in the office, and a printed paper put into the servant's hand who delivered the parcel. It was doubtful if the servant saw the board in the office; and in the printed paper, by accident, as it was alleged, the terms of restriction were omitted.

Lord *Ellenborough* held the notice to be insufficient. And at the same sittings, in *Davies v. Willan*, where the person who carried the parcel could not read. In this case, neither the board in the office, nor the printed paper of conditions, were of any service. Mr. Justice *Abbott* held notwithstanding that the carrier was liable upon his ordinary liability.—*Seem*, that the question should be put, whether the party can read or not. If he cannot read, the notice should be read to him.

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 WESTMINSTER.

LOWDEN and Another v. HIERONS.

ASSUMPSIT.—The plaintiffs were lessees of Covent Garden market under the Duke of Bedford; and the action was brought to recover some tolls which they claimed to be due to them. The lease under which they derived title was by deed; and they paid an annual rent to the Duke of Bedford of 2,900*l.* To this lease was annexed a schedule of the tolls which the plaintiffs were empowered to demand. It appeared, that the defendant had offered to pay 4*d.* for every waggon, and 2*d.* for every cart, which he brought loaded to the market; but he had pleaded no tender of the sum of eight-pence, which was part of the demand claimed in respect to two waggons. The plaintiffs, in addition, demanded, by virtue of the schedule of tolls annexed to their lease, and, (as they alleged,) by an uniform custom and usage, 1*d.* per sack for beans, and 1*d.* per sack for peas. The real contest between the parties was for the sum of 3*s.* 10*d.*, being the aggregate of the tolls claimed for 30 sacks of beans, and 14 sacks of peas.

Q.—If tolls can be claimed under a modern grant of a liberty to hold a market, &c., and to receive the accustomed dues and tolls, &c.; but to which grant no specific tolls are annexed.

It was in evidence, that the tolls had varied much in amount, and that the rent paid by the lessees

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had fluctuated in proportion. There appeared to be no uniform practice or usage to regulate the tolls ; but the counsel for the plaintiffs relied on a modern statute, 53 G. 3. c. 71, which was an act passed to remove nuisances, and to regulate the tolls in Covent Garden Market. The fifth section in this act empowered the Duke of *Bedford*, as owner of the market, to claim and receive such tolls as were *usually taken*.

Upon the part of the defendant, a great mass of documentary evidence was produced, the object of which was to shew that Covent Garden was a market of recent origin, and that no grant of tolls was annexed in the original grant of the market to the ancestors of the Duke of *Bedford*. In the 6th of Edward VI., there was a grant to *John*, Earl of *Bedford*, of all the lands of Covent Garden, &c. then described as pasture land, paying rent to the crown of 5*l.* 6*s.* 8*d.* In the 3d of Eliz. was a bargain and sale between the Earl of *Bedford* and Sir *William Cecil* "of all that piece of pasture ground, being parcel of one great pasture ground, called *Covent Garden*." Several other ancient deeds were produced ; but the charter which bore chiefly on the case, was a charter or grant from the crown, in the 22nd of Charles II., to the Earl of *Bedford*, of liberty "to have, and hold, and keep a market in Covent Garden, &c." The charter then proceeded to enumerate some subordinate regulations ; and concluded with a grant "of all tolls and customary fees belonging to the said markets, and usually *had and enjoyed with markets of the*

like kind." The original words in the charter were, "*tolnetis, &c. hujusmodi mercaturæ aliquatenus spectantibus.*"

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Lens, Onslow, and Copley, serjeants, for the defendant, contended, that the present action could not be maintained; tolls were not due except by grant, prescription, or for some just consideration. The plaintiffs were bound to establish their demand upon some legal foundation. There could be no such thing as an arbitrary, variable toll, raised or diminished at the caprice of the proprietor of the market. Courts of law looked jealously upon these exactions, which were an incumbrance upon that freedom of trade which the subject enjoyed as his birthright. Covent Garden was a market of modern origin. It might, perhaps, be contended, that the charter of Charles II. could not create a toll. But this consideration of the case was not necessary, inasmuch as the charter did not grant any specific tolls whatever. The market was, in its origin, a free market; and it is an undoubted legal proposition, that if the king grant a market without any tolls, the royal authority could not afterwards annex tolls by subsequent grant. The words in the charter of Charles II., which gave the ancestors of the Duke of *Bedford* liberty to demand and receive the due and accustomed tolls, were idle and void. For no tolls whatever were shewn to be annexed to the grant: there was no evidence of any ancient or accustomed toll. Besides, their necessary and natural uncertainty, when so vaguely expressed, was a death-wound to the demand. Here was no precise toll given; and, what was

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more extraordinary, no precise toll had ever been demanded. It were to dispute almost the elements of law to bring forward a claim for tolls under such circumstances ; a modern grant of market *without* tolls ; and a variable, arbitrary usage in the demand and receipt of the tolls themselves. But the plaintiffs, it should seem, would rest on the act of Parliament of 53 Geo. III. But that act professed to give nothing. It was a mere act of regulation. It spoke only of the *accustomed* tolls ; and transferred the payment of the tolls to the seller, which were due at common law from the buyer. The act, therefore, grounded itself upon a preconceived right, which it was for the Duke of *Bedford* to establish, of a previously existing grant of toll. It was not a declaratory act, or a grant of tolls *eo nomine* ; but was specially confined to regulation.

Best and *Blossett*, serjeants, *contra*, tendered evidence, that the tolls demanded were such as were paid at other markets, and in all the markets of London. They proposed to give parole testimony of this kind, on account of the words in the charter of Charles II. "*hujusmodi mercaturæ spectantibus*." They relied, however, mainly upon the 53d Geo. III., and contended, that the defendant must, at all events, have a verdict against him for 8*d.*, being the tolls for the two carts ; which sum he had never disputed, but had offered to pay.

PARK, J.—I am afraid, in the present stage of this enquiry, that the defendant must have a verdict against him for the toll of the carts. He has neglected to plead a tender, With respect to any evi-

vidence of the usage in the other markets in *London*, I shall certainly not receive it. The rights of individuals to demand and receive toll are not to be derived out of the franchises and privileges of other persons, in other markets; but must depend upon the terms of the grants and charters by which they themselves hold such markets. I am of opinion that there is no pretence for the toll of one penny per sack for beans and peas. The Jury will discharge that from their consideration. I am much inclined to think that no toll whatever can be demanded under the charter, whatever may be the construction of the Act of Parliament. But I will reserve this point for the Court, and give the defendant liberty to move to enter a nonsuit, if the Court should be of opinion that no toll of any kind whatever is due in point of law.

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The Jury found a verdict for 8*d.* for the two carts, and negatived the rest of the demand.

Best and *Blossett*, serjeants, and *Espinasse*, for plaintiffs.

Lens, *Onslow*, and *Copley*, serjeants, for defendant.

Lord *Coke* treats very fully upon the subject of tolls in the 2 Inst. 220. Toll to the fair or market, says he, is a reasonable sum of money due to the owner of the fair or markets, upon the sale of things tollable within the fair or market. And this was first invented that contracts might have good testimony, and be made openly; for, of old times,

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privy or secret contracts were forbidden.

Again, says his lordship, every one that has a fair or market, ought to have it by grant or prescription. If the king grant to a man a fair or market, and grant no toll, the patentee shall have no toll; for toll being a matter of private emolument for the benefit of the lord, is not incident to a fair or market so granted, without a special grant, as was adjudged in the case of *Northampton*; for such a fair or market is accounted a free fair or market. And there it was also resolved, that after such a grant made, the king cannot grant a toll to such a free fair or market without *quid pro quo*; some proportionable benefit to the subject. 2 Inst. 220.

In conformity with these principles thus laid down by Lord Coke are all the modern cases. Thus, in *Holloway v. Smith*, 2 Strange, 1171, it was adjudged by the Court of K.B. that toll was not incident of common right to a fair; that it would not pass under general words in the grant of a new fair, nor would custom extend to support a toll in such a fair. The reason, indeed, is evident. Trade is free by the law of England in all

customary and lawful branches; and monopolies, except in some particular instances, where they are limited and partial, and granted upon good consideration, (as by the 21st Jac. I. c. 3), are in derogation of the liberty the subject, and of natural rights.

By St. West. 1. 3d Edw. 1. 31. if the lord take an outrageous toll, the king shall take the franchise. Lord Coke thus comments upon these words: An outrageous toll, he says, is taking toll when there is none due; or, if more be exacted than is due, or the party be discharged from toll, 2 Inst. 220. That the grantee of a fair or market shall not have toll without a special grant, has been determined in many cases. See Com. Dig. tit. Market, f. 1. where the cases are collected. So it has been resolved, that, if the king grant a market, &c. *cum omnibus libertatibus pertinentibus*, the grantee shall have no toll, Palm. 78. It is considered, indeed, by Lord Ch. B. Comyn, as a constitutional restriction upon the prerogative of the crown itself, that, after a fair or market has been granted, the king himself cannot grant a toll without a *quid pro quo*, tit. Prerogative, D. 48. And, therefore, it is not sufficient

to allege the grant of a market with all tolls belonging to it; but there must be alleged an *express* grant, or a *prescription* for toll, Lut. 1380. If the grantee of a market under letters patent from the crown, suffer another to erect a market in his neighbourhood, and use it for the space of 23 years without interruption, he is by such use barred of his action on the case for the disturbance of his market. *Holcroft v. Heel*, 1 Bos. and Pull 400.

In that case a question was raised, but not determined,—whether, if no specific toll be granted in the letters patent, by which the market was erected, the grantee would be entitled to any toll, and whether in such case he could support an action for an injury to his market.

For cases on the subject of tolls, see *Moseley v. Pearson*, 4 T. R. 104. *The Bailiffs, &c. of Tewkesbury v. Diston*, 6 East. 438. *Hill v. Smith*, 10 East. 476. 4 Taunton, 520.

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DALLAS, J.—I think the case to which my brother *Best* has referred, and the admirable reasoning of Lord Chief Justice *Gibbs*, upon which that case is founded, and upon which I think it will stand unshaken, are decisive upon this point. *Diggles* was no such a money scrivener as the statutes of bankruptcy contemplate. The attorney was predominant. The bonds, judgments, and warrants of attorney, by which the annuities are secured to the grantee, were prepared in his office, and he charged for them. These charges, in which, it is said, the annuity commission was included, were the subject of taxation. In all the cases which have been adduced in evidence, this man acted as an attorney.

His Lordship likewise took the opinion of the Jury upon the facts; and they expressed an unanimous opinion, that *Diggles* had acted as an attorney in all the transactions before them.

Verdict for plaintiff.

Best and *Vaughan*, serjeants, and *Campbell*, for plaintiff.

Copley, serjeant, and *Barnewall*, for defendants.

See ante, p. 507, case of *Hutchinson v. Gascoigne*, and the note to that case.

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LANCASTER SUMMER ASSIZES, 57 GEORGE III. 1817.

HARDMAN v. CLEGG.

THIS was the case of a writ of right to recover lands in the county palatine of Lancaster. The writ was as follows:—"George III., by the grace of God of the united kingdom of Great Britain and Ireland, king, defender of the faith, and so forth, to the sheriff of the county palatine of Lancaster, greeting, command *Samuel Joseph Clegg*, that he justly and without delay render unto *James Hardman*, one equal and undivided moiety of two messuages, of three cottages, of three barns, of three stables, of three out-houses, of three gardens, and sixty acres of arable, meadow, pasture, and woodland, with the appurtenances, in the parish of Childwall, in the said county palatine, which he claims to be his right and inheritance, and to hold of us in chief, and whereof he complains that the aforesaid *William* unjustly deforces him. And unless he shall so do, and if the said *James*

1. Writ of right.—Tender of the demy mark, and what the demandant is bound to prove upon such tender, previous to the tenant being put upon proof of his title.

2. Evidence of a general perception of rent of the tenements, of which those demanded formed part, held to be sufficient proof of possession to support a fine levied with proclamations, against the plea, *quod partis finis nil habuerunt*, &c., so as to bar the heir who never made actual entry after the death of his ancestor.

¶ In this case the tenant pleaded the general issue, and also further pleas of fines with proclamations, similar to the case of *Tissen v. Clarke*, 3 Wilson, 419.—The demandant replied to the further pleas, and issue was also joined upon them. For this reason, and inasmuch as the suit was for lands in the county palatine of Lancaster, the writ and pleadings are given at greater length than might otherwise be deemed necessary.

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shall give you security for prosecuting his claim, then summons by summoners the said *William*, that he appear before our justices of Lancaster at Lancaster, on the first day of the next General Session of Assizes, to be there holden, to shew wherefore he hath not done it. And have you there the summoners and this writ. Witness ourself at Lancaster, the 21st day of November, in the 56th year of our reign." EVANS.—Pleas at Lancaster, before Sir *Simon Le Blanc*, Knight, and Sir *Alexander Thompson*, Knight, Justices of the court of Common Pleas of the lord the king, within his county palatine of Lancaster, at the general session of Assizes, there to be holden on the 23d day of March, in the 56th year of the reign of the lord, George III. of the united kingdom of Great Britain and Ireland, king, defender of the faith, &c.

LANCASTER } *James Hardman*, by *Charles Row-*
 TO WIT. } *linson*, his attorney, demands against
 } *Joseph Samuel Clegg*, one equal
 undivided moiety of two messuages, of three cottages, of three barns, of three stables, of three out-houses, of three gardens, of three orchards, and of sixty acres of arable, meadow, pasture, and woodland, in the parish of *Childwall*, in the said county palatine of *Lancaster*, as his right and inheritance, by writ of the lord the king, of right, issued out of his court of Chancery, of his said county palatine. And whereupon he saith, that one *John Hardman* was seized of the said equal undivided moiety of the tenements aforesaid, with the appurtenances, in his demesne, as of fee and right, in the time of peace, in the time of the lord *George II.* late

king of *Great Britain*; to wit, within sixty years next before the issuing of the aforesaid writ, by taking the esplees thereof to the value, &c. and died hereof seized. And the said *James Hardman* further saith, that upon the death of the said *John Hardman*, for that he left one *Jane* him surviving, but left no heirs or issue of his body; and that by his last will and testament, in writing, bearing date the first day of *November*, in the year of our Lord 1754, and duly published and executed by the said *John Hardman*, in his lifetime, and when he was seized in fee of the said undivided moiety of the said tenements with the appurtenances, devised his said undivided moiety of the tenements, with the appurtenances, in default of his leaving issue, unto his nephew, *John Hardman*, then eldest son of his late brother, *James Hardman* deceased, and his assigns, for and during the term of his natural life, without impeachment of waste, and from and after the determination of that estate to his cousins *James Baron* and *Joseph Baron*, and their heirs, during the lifetime of his said nephew, *John Hardman*, upon trust, to preserve the contingent remainders and estates thereafter limited from being defeated or destroyed, with a power to the said trustees, as occasion should require; but nevertheless to permit and suffer the said *John Hardman*, his nephew, and his assigns, to take the rent, issues, and profits thereof, during his life; and from and after his decease then to the use of the first and every other son and sons of the body of his said nephew *John Hardman*, lawfully begotten, severally, successively, and in remainder one after another, as they

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and every of them should be in priority of birth and seniority of age, and the heirs of his and their body and bodies lawfully issuing; the elder of such sons, and the heirs of his body, being always preferred before the younger of them, and the heirs of his body lawfully issuing; and that for default of such issue, that then he gave and devised the said premises to his nephew *James Hardman* for his life, without impeachment of waste, with remainder, to the said *James Baron* and *Joseph Baron*, and their heirs, to preserve contingent remainders; which contingent remainders were by the last will and testament of the said testator *John Hardman* expressed to be, and he thereby gave and devised the said undivided moiety of the said premises, with the appurtenances, to the use and behalf of the first and every other son and sons of his said nephew *James Hardman*, and the heirs of the body and bodies respectively of such said son and sons, in the same order and manner as he had thereinbefore applied the said premises unto the son and sons of his said nephew *John Hardman*. The right to the said undivided moiety of the said tenements, with the appurtenances, descended and came to the said *John Hardman* as nephew and heir of the said *John Hardman*, who was seized of the said premises as aforesaid, that is to say, as the son and heir of the said *James Hardman*, who was the only brother of the said *John Hardman*, who died seized as aforesaid, subject to the right of dower of the said *Jane*, the wife of the said *John Hardman*, which right of dower became determined and ceased by the death of the said *Jane Hardman*, in

the lifetime of the said *John Hardman* the nephew, and also subject to the several estates in the said undivided moiety of the said tenements, with the appurtenances, given and devised by the said last will and testament of the said *John Hardman*, who was seized of the tenements as aforesaid, and from the said *John Hardman* the nephew, in whose lifetime the said *James Hardman* the nephew died without ever having had any heirs or issue of his body, and which *John Hardman* the nephew also died without ever having had any heirs or issue of his body. Whereupon all the estates of freehold and inheritance of and in the said undivided moiety of the said tenements, with the appurtenances, devised and created by the said last will and testament of the said *John Hardman*, who was seized of the said premises, being determined or incapable of taking effect, the right to the said undivided moiety of the said tenements, with the appurtenances, descended and came to one other *James Hardman*, as eldest cousin and heir of the said *John Hardman* the nephew, to wit, as son and heir of one other *John Hardman*, who was son and heir of one other *John Hardman*, which last mentioned *John Hardman* was the eldest brother of one other *James Hardman*, the said last mentioned *John Hardman* and *James Hardman* being sons of one *William Hardman*, which last mentioned *James Hardman* was the father of one *Richard Hardman*, which *Richard Hardman* was the father of the said *James Hardman*, the brother of the said *John Hardman*, who was seized of the said premises as aforesaid, which last-mentioned *James*

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Hardman was father of the said *John Hardman*, the nephew of the said *John Hardman*, who was seized of the said premises as aforesaid. And from the said *James Hardman*, the eldest cousin and heir of the said *John Hardman*, the nephew of the said *John Hardman*, who was seized of the said premises as aforesaid, the right to the said undivided moiety of the said tenements, with the appurtenances, descended and came to one other *James Hardman* as son and heir of the said *James Hardman*, the cousin and heir of the said *John Hardman*, the nephew of the said *John Hardman*, who was seized of the said premises as aforesaid; and from the said *James Hardman*, the son and heir of the said *James Hardman*, the right to the said undivided moiety of the said tenements, with the appurtenances, descended and came to *James Hardman*, the now demandant, as son and heir of the said *James Hardman*, the son of the said *James Hardman*, the cousin of the said *John Hardman*, the nephew of the said *John Hardman*, who was seized of the premises aforesaid. And that this is his right he the said *James Hardman*, the now demandant, offers suit and good proof.

SAMUEL JOSEPH CLEGG	}	And the said <i>Samuel</i>
v.		<i>Joseph Clegg</i> , by <i>John</i>
JAMES HARDMAN.	}	<i>Whittle</i> , his attorney,

comes and defends the right of the said *James Hardman*, and the seizin of the said *John Hardman*, whom, &c. and the whole, &c. and whatsoever, &c. and mostly of tenement aforesaid as of fee and right, &c. And he puts himself upon the grand assize of our Lord the King; and

prays a recognition to be made whether he, the said *Samuel Joseph Clegg*, has a greater title to hold the tenements with the appurtenances as tenant thereof as he now holds the same, or whether the said *James Hardman* has title to hold the same tenements as he has demanded the same, &c. And, for a further plea in this behalf, the said *Samuel Joseph Clegg*, by leave of this Court here for this purpose first had and obtained, according to the form of the statute, in such case made and provided, says, that the said *James Hardman* ought not to have or maintain his aforesaid action thereof against him the said *Samuel Joseph Clegg*, because he says, that one *Richard Pilkington* was seized in his demesne as of freehold of the said tenements, with the appurtenances, amongst other things in the time of peace, in the time of the said Lord George the Second, late King of Great Britain; and the said *Richard Pilkington* being so seized, a certain fine was levied on *Saturday*, the 25th day of *August*, in the 33d year of the reign of the said Lord George, in his said Majesty's Court here at *Lancaster*, at a certain session thereof then and there holden before his then justices at *Lancaster*, and others then and there present, between *Robert Taylor* and *William Longworth*, Gentlemen, plaintiffs, and the said *Richard Pilkington*, defendant, of the tenements aforesaid, with the appurtenances, with other things, by the names of the manor of *Allerton*, with the appurtenances, and of 22 messuages, four cottages, one windmill, one dove-house, 22 barns, 10 stables, 20 gardens, 20 orchards, 220 acres of land, 60 acres of meadow, 220 acres of pasture, and 80

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acres of heath and ling, and common of pasture for all cattle, with the appurtenances, in *Allerton*, *Great Woolton*, *Garston*, *Aighburgh*, otherwise *Aighbirth*, *Gressendale*, *Childwall*, and *Liverpool*; and also of the moiety of five messuages, five barns, five gardens, five orchards, one dove-house, 36 acres of land, 24 acres of meadow, 55 acres of pasture, and 30 acres of heath and ling, with appurtenances, in *Aighburgh*, otherwise *Aighbirth*, and *Garston*, and likewise of one-third part of one messuage with the appurtenances in *Liverpool*. Whereupon a plea of covenant was summoned between them in the same court (that is to say) that the said *Richard Pilkington* had acknowledged the manor, tenements, common of pasture, moiety, and third part, with the appurtenances, to be the right of the said *Robert*, as those which they the said *Robert* and *William* had of the said *Richard*; and those he had remised and quit claimed from himself, the said *Richard Pilkington*, and his heirs to the said *Robert* and *William*, and the heirs of the said *Robert*, for ever; and moreover the said *Richard Pilkington* had granted for himself and his heirs that they would warrant to the said *Robert* and *William*, and the heirs of the said *Robert*, the said manor, tenements, common of pasture, moiety and third part, with the appurtenances, against him the said *Richard*, and his heirs, for ever; and for that acknowledgment, quit-claim, warranty, fine, and agreement, the said *Robert Taylor* and *William Longworth* had given to the said *Richard Pilkington* 3,300*l.* sterling, which fine, levied in manner aforesaid, was engrossed, and was afterwards publicly and solemnly

read and proclaimed in the court, according to the form of the statute in such case made and provided, to wit, the statute made in the thirty-seventh year of the Lord Henry VIII. late King of *England*, in manner following, that is to say, the first proclamation was made in the same court here on *Saturday*, in the said session; the second proclamation was made on *Tuesday*, in that same session; the third proclamation was made on *Thursday*, in that same session; the fourth proclamation was made in the open session, held at *Lancaster* aforesaid, on *Monday*, the 17th day of *March*, in the 33d year of the reign of the said Lord George the Second; the fifth proclamation was made on *Wednesday*, in the same session; the sixth proclamation was made on *Friday*, in that same session; the seventh proclamation was made in the open session, held at *Lancaster* aforesaid, on *Saturday*, the 17th day of *August*, in the 34th year of the reign of the said Lord the King; the eighth proclamation was made on *Tuesday*, in that same session; and the ninth proclamation was made on *Thursday*, in that same session, as by the said fine and the proclamations made therein now remaining in the court here of record more fully appears. And the said *Samuel Joseph Clegg* saith, at the time of the readings aforesaid, made in manner aforesaid, all pleas ceased in the said court here according to the form of the statute in such case made and provided, whereby the tenements aforesaid with the appurtenances above demanded by the said *James Hardman*, by reason of the said fine with proclamations made thereon as aforesaid, remained established to the said *Robert Taylor* and

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William Longworth, and the heirs of the said *Robert*, for ever; and this he the said *Samuel Joseph Clegg* is ready to verify; wherefore he prays judgment if the said *James Hardman* ought to have or maintain his aforesaid action thereof against him.

There was a further plea, in like form, of a fine levied on *Saturday*, the 24th day of *March*, in the 4th year of the reign of *George the Third*, between *John Walmsley*, gentleman, and *James Lever*, yeoman, plaintiffs, and *James Russell* and *Ann* his wife, defendants, of the said moiety of the said premises; and a further plea of a fine in the 10th year of the reign of *George III.* between *James Gildart*, Esq. plaintiff, and *James Russell* and *Ann* his wife, *Edmund Ogden* and *Mary* his wife, defendants, of the said moiety of the said premises. And of a further plea of a fine, levied in the 27th year of *George III.* between *John Addison*, plaintiff, and *John Pilkington*, and *Sarah* his wife defendants, of the said moiety; all which pleas were in the like form, and concluded, and this the said *Samuel Joseph Clegg* is ready to verify; wherefore he prays judgment, if the said *James Hardman* ought to have or maintain his aforesaid action thereof against him, &c.

JAMES HARDMAN.	}	And the said <i>James Hard-</i>
v.		<i>man</i> as to the plea of the
WILLIAM ROSCOE.	}	said <i>William Roscoe</i> , by him
		first above pleaded, and whereby he hath put him-
		self upon the Grand Assize, doth the like. And as
		to the said plea of the said <i>Samuel Joseph Clegg</i> ,

by him secondly above pleaded, the said *James Hardman* saith, that by reason of any thing by the said *Samuel Joseph Clegg* in that plea above alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against him, because he saith that the said *Richard Pilkington*, and *Robert Taylor*, and *William Longworth*, who were the parties to the said fine in the said second plea mentioned, had not, nor had any or either of them at the time of levying the said fine in that plea mentioned, any thing as of freehold in the moiety of the tenements, with the appurtenances above demanded, and whereof with other things the said fine is by the said second plea alleged to have been levied; but the said *James Hardman*, the demandant, in fact saith, that the said *James Hardman*, the cousin and heir of the said *John Hardman*, the nephew, before and at the time of levying the said fine in the said second plea mentioned, was seized of the said moiety of the said tenements, with the appurtenances above demanded, in his demesne as of fee, whose estate therein he the said *James Hardman*, the demandant, now hath. And this he the said *James Hardman*, the demandant, prays may be inquired of by the country, &c. And as to the said plea of the said *Samuel Joseph Clegg*, by him thirdly above pleaded, he saith, that by reason of, &c. because, &c. (*partes finis nil habuerunt, &c. tempore levatis, &c.* in the same form only that the seizin is averred to be in *James Hardman*, the father of the demandant, whose estate *J. H.* now has,) and this &c. Replication to fourth plea to like effect and in like form; replication to fifth plea to like effect,

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and in like form; and conclusion to the country upon each. And the said *Samuel Joseph Clegg*, as to the replications of the said *James Hardman* to the said second, third, fourth, and fifth pleas of the said *Samuel Joseph Clegg*, and which he the said *James Hardman* hath prayed may be inquired of by the country, doth the like. Therefore in order to try the cause aforesaid between the parties aforesaid, to be tried by the Grand Assize; it is commanded to the sheriff that he summons by good summoners four lawful knights of his county, girt with swords, that they be here on

to make election of the assize aforesaid. The same day is given to the parties aforesaid to hear the election of the assize aforesaid, &c. And in order to try the several issues above joined, to be tried by the country, the sheriff is commanded that he cause to come here on

twelve, &c., by whom, &c. and who neither, &c. to recognize, &c., because as will, &c.

LANCASTER ASSIZES, 57 GEO. III.

HARDMAN, Demandant	}	A rule <i>Nisi</i> to obtain judgment, as in case of a non-suit, was afterwards obtained in the following form:—The first day of April 1817, upon reading the affidavit of <i>George Todd</i> , it was ordered by the Court, that the tenant in this cause be allowed such costs as the Prothonotary of this court, or his deputy, shall tax in his behalf, by reason of the demandant not having proceeded to the trial of some of the issues
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in this cause at these Assizes, pursuant to the course and practice of this Court, unless good cause be shewn to the contrary at the sitting of the Court on Saturday next.

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By the Court.—On motion of Mr. *Richardson* upon shewing cause, this rule was discharged; and at March Assizes, 1817, the following rule was entered into by consent.

LENT ASSIZES, 57 GEO. III.

HARDMAN, Demandant	}	The 26th day of <i>March</i> , 1817, upon reading a for- mer rule made in this cause the 25th day of <i>March</i> instant, and upon hearing counsel on both sides, and by consent of the parties, their Counsel and Attornies. It is or- dered by the Court, that the tenant be at liberty to issue a writ of summons, returnable on the 1st day of the present Assizes, commanding the sheriff to return four knights to appear here in Court at the return of the said writ, to choose the Grand Assize; and that their appearance be duly recorded ac- cording to the exigency of the said writ: and it is further ordered by the like consent, that 20 jurors, to be taken by the under sheriff out of the jury- panel, be returned for the trial of causes at the next Assizes, and be considered as the recognitors chosen by the said four knights, or if any or either of them should not appear at the next Assizes, the under sheriff shall be at liberty to supply the places of such of them as shall so make default with an equal number of the gentlemen attending the
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grand jury at the next Assizes; and the names of the gentlemen so supplied, together with the rest of the said four knights, and with twelve of the said 20 jurymen, so to be taken by the under-sheriff as aforesaid, shall form the Grand Assize between the parties; but the names of the four knights now to be returned shall nevertheless be entered upon the record as the four knights forming the Grand Assize by the Court.

At the Summer Assizes of 1817, this cause came on to be tried. The tender of the demy mark was made before the Grand Assize was sworn. It was objected on the part of the demandant, that the tenant could not, by making the tender at this stage of the cause, call upon the demandant to begin his case: for that purpose the tender ought to have been made at the joinder of the Mise. *Viner's Abridg. T. Droit. D. 13.*

Wood, Baron, ruled that the tender of the demy mark, before the swearing of the Assize, was sufficient to put the demandant to shew the seizin of the ancestor.

The Assize was then sworn to inquire of this seizin. *John Piers*, a witness for the demandant, had lived at *Allerton* 68 years, knew *John Hardman* (the ancestor); all *Allerton* belonged to him, except about 70 acres. He was buried at *St. George's church at Liverpool*. After his death, *Pilkington* and *Russell* had it in moieties; *Russell* sold to *Ogden*, and *Ogden* to *Clegg*, the father of the tenant. The witness then described the

different closes in the possession of *Clegg*, and the number of acres in each, and the farm-houses on the same cross examined. He never saw any rent of these tenements paid to *John Hardman*, who had been dead many years before he came to the farm. Re-examined.—*Clegg* said, that he gave 14,500*l.* for the half of *Hardman's* estate. *Joseph Swift*, born at *Allerton*, aged 76 years—*Clegg* had about 32 acres; the witness's father held of *John Hardman*. Cross-examined.—Never saw any rent paid to Mr. *Hardman*, but has heard his father speak of Mr. *Hardman's* being his landlord. The register of the burial of *John Hardman*, and the teste of the writ, were then read. Here it was objected for the tenant that the evidence did not support the writ and count, the evidence being that *John Hardman* was seized of the whole.

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Mr. Baron Wood over-ruled this objection, and a verdict was found that the ancestor was seized. The Grand Assize were then sworn to try the truth, whether the demandant or tenant had right; and were also sworn to try the issue joined between the parties. For the tenant, the case was opened by stating that the evidence to shew that the parties to the fines pleaded were seized, at the time of levying them, would be first entered into, in order to shorten the case, and likewise to save the necessity of going into the pedigree. That upon the death of the purchaser *John Hardman*, *Pilkington* had entered as his heir, through one of the sisters of the purchaser's grandfather; and that he levied a fine of the whole, but afterwards gave up a moiety to *Russell*, the descendant of another sister of the grand-

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father, when he appeared and claimed. That *Pilkington*, before he levied the fine, had been in receipt of the rents which was sufficient to give effect to the fine.

The evidence adduced in support of this, was a counterpart of a lease by *Pilkington* to the widow of *James Hardman* (the purchaser of the other moiety of the estate with *John Hardman*) of *Allerton Hall and Garden*, for 50 years, if she should so long live, at a pepper-corn rent, which appeared to be sealed by the widow *Hardman*. Objected, this does not include *Clegg's* property. *Jonathan Smith* called; said, he remembered *J. Hardman* and his death, and the death of his nephew; he remembers that *Pilkington* came to take possession; he turned the witness's family out of the house, but kept them out only a short time. They held a long lease at a lord's rent. A lease from *Russell* to the widow *Hardman* in 1767, and from *Russell* and *Ogden* to her in 1770, of *Allerton Hall and Garden*, were then put in. *Pilkington*, the grandson of the said *Pilkington*, was then called.—He remembered his grandfather and father going to *Allerton* to take possession in 1759, but he did not go with them. They used to go twice a year to *Allerton*, in order to receive rents, but he did not go with them; his father died in 1768. He remembered being present when one moiety of the rents was received in 1773. He joined as heir at law of his grandfather, in levying the fine in 1787. Upon this evidence the Grand Assize, under the direction of his Lordship, who held it sufficient evidence of the seizin of *John Pilkington*,

ton for his fine to operate as a bar, found a verdict for the tenant.

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Hullock, serjeant, *Cross*, *Gardner*, and *Parke*, for the demandant.

Scarlett, *Littledale*, and *Richardson*, for the tenant.

The course which the court took upon the tender of the demy mark, was upon the authority of the 514th section of *Littleton*. *Booth* on real actions, p. 98, makes a *quære*, "What is the true reason of this tender of the demy mark?" and he refers to a record, which he afterwards sets forth in page 102, where the tender of the demy mark is entered upon the record, and is expressed to be, to the end that it may be enquired as to the time, &c. Now it is apprehended, that this payment of the demy mark in court to the use of the king, is agreeable to that ancient usage, by which parties, in certain cases, obtained the indulgence of departing from the strict course of the court, by paying a sum of money to the use of the king. The king's silver, which is paid upon the levying a fine, probably originated in the same ancient practice, the money being paid *pro licentia concordandi*. See *de modo levandi fines*, 18 Edw. I.; and 2 Inst. 511.

It seems a more difficult speculation to assign a reason for the distinction, why this indulgence should be granted to the tenant, when the seizin under which the demandant claimed was laid in a past reign, and not when laid in the existing reign. The authorities do not give any account of the origin of the practice. But it may be supposed, that the frequent change of dynasty consequent upon the contested claims of the houses of *York* and *Lancaster*, with the attainders and forfeitures, and reversal of such attainders and forfeitures, at each succession of the prevailing party, frequently rendered an inquiry into the seizin in a former reign a very complex and difficult question: therefore

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it was deemed reasonable that such question should be cleared up, before the tenant should put the validity of his title to trial. But *Brooke*, in his *Abridgment*, *Droit*, p. 32, does not appear to regard this distinction; for he says, "At that time issue may be tendered upon the seizin by the new statute of limitations, viz. 32 *Henry VIII.* cap. 2." And, since that statute, it seems unnecessary to alledge in what reign the seizin was. *Booth*, *Real Actions*, 99.

Upon the question, what seizin will support a fine with proclamations, so as to bar strangers to the fine, it seems as if the old authorities, beginning with *Plowden* and *Dier*, are calculated rather to throw difficulty into the way of deciding upon this subject; and this difficulty arises upon the use of the expression, that the fine shall bar a stranger whose estate is *turned to a right*; which is an indefinite word, as here used, for it may mean a right of entry, or a right to bring a possessory action, or the mere right where the possessory action is gone. The apparent contradiction of terms in the early reports has probably arisen from an endeavour to reconcile the doctrine of the still earlier authorities

with that system of modern conveyancing, which was the consequence of the statute of uses, and which has left no other external marks of a legal possession, than the actual occupancy, or receipt of the rents and profits—or the evidence of deeds or assurances giving a title consistent with the occupancy or receipt of the rents and profits by another person; as in the case of mortgagee or trustee. But, before the statute of uses, when the performance of services in kind by the tenants was a substantial profit to the lord of the seignory upon which the tenures depended, and it was important to the lord, that the possession of every tenement should be ascertained and recorded, the evidence of the legal estate of the tenant was his investiture of the tenancy in the lord's court, as described by Lord *Mansfield* in his judgment upon the case of *Taylor* ex. dem. *Atkyns v. Horde*, 1 Burr. 60.

So that in those early times, when the spirit of feudal tenures was strictly acted upon, a disseisin was a totally different proceeding from what it possibly can be at this day; if, indeed, such a thing can exist, under the present system of title to lands, as a disseisin

against the election of the party put out of possession. This is admitted by conveyancers to be doubtful.

But now it is considered, that an adverse possession, not commencing by being derived under the title to which it is adverse, will support a fine with proclamations, so as to bar a stranger at the end of five years. The case of *Doe ex dem. Foster v. Williams*, Cowp. Rep. 621., though the present question was not then directly in point, is sufficient to determine this point. There the heir brought his action against the intruder, who had levied a fine before the five years had elapsed, but failed upon the ground

that he had not made an actual entry to avoid the fine; thus proving, that the intruder, who had taken the rents of the property, had acquired such an estate, as would render his fine effectual for every purpose against a stranger to the fine. In a late case of *Doe v. Perkins*. 3 Maule and Selwyn, 271. it has been decided, that a tenant, holding over his term without paying of rent, cannot, by a fine with proclamations, bar the right of the landlord or his heirs; which is by reason of his possession commencing under, and being, in its origin, derived out of the title in opposition to which the fine is set up.

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MEMORANDA.

IN *Taylor v. Curtis*, p. 192, the Court held, upon the argument, that the expenditure of ammunition, damage to the ship, and the cure of wounded seamen, incurred in resisting a privateer, were not the subject of general average, 6 Taunt. 608.

In *Thornton v. Simpson*, p. 164, on a motion to set aside the verdict, the Court expressed an opinion confirming the judgment given by the Lord Chief Justice at the trial, 6 Taunt. 556.

In *Gaskell v. Lindsay*, p. 212, tried before Mr. Justice *Le Blanc*, at *Lancaster*, the Court set aside the verdict, which had been found for the defendant, and directed a verdict to be entered for the plaintiff.

In *Hill v. The Sheriff of Middlesex*, p. 217, the Court expressed themselves to be of the same opinion with that given by the Lord Chief Justice at the trial, 7 Taunt. 8.

In the same manner in *Bennett v. Moita*, p. 416. and see 7 Taunt. 258; and in *Benson v. Schneider*, p. 416, tried before Mr. Justice *Burrough*, 7 Taunt. 272.

In *Bunn v. Markham*, p. 352, the Court determined (in conformity to the opinion intimated by the Lord Chief Justice at the trial) that, to constitute a *donatio mortis causa*, there must be a delivery of the articles given, and a continuing possession in the donee, 7 Taunt. 224. In this case the Lord Chief Justice, adverting to the case of *Spratley v. Wilson*, p. 10, said, "that what he had there, somewhat improvidently thrown out, could not be maintained, because a delivery (of the watch) was wanting, and he had accord-

ingly written a remark to that effect at the end of his own note of the case."

In *Goupy v. Harden*, p. 342, and 7 Taunt. 159; and in *Hedbergh v. Pearson*, p. 349, and 7 Taunt. 154, the Court confirmed the ruling of the Lord Chief Justice.

In *Kemble v. Atkins*, p. 427, and 7 Taunt. 260, the Court adopted the opinion intimated by Mr. Justice *Dallas* at the trial.—See likewise the note to that case.

In *Litt v. Cowley*, p. 388, and 7 Taunt. 169, the Court decided in conformity with the opinion expressed by the Lord Chief Justice at the trial.

In the same manner in *Stewart v. Fry*, p. 372, and 7 Taunt. 339; and in *Stuart v. Smith*, p. 321, and 7 Taunt. 158. In *Simpson v. Bloss*, p. 273, and 7 Taunt. 246, the Court were of opinion, that the demand was so connected with an illegal transaction, that the plaintiff could not recover.—The reader will be pleased, therefore, to correct the inaccuracy of the note in this respect.

In *Swinger v. Samuda*, p. 395, and 7 Taunt. 265, which was tried before Mr. Justice *Park*, the Court confirmed the ruling of the Learned Judge at the trial.

For the result of the motion in *Evelyn v. Raddish*, p. 548, see 7 Taunt. 411.

In *Fairlie v. Christie*, p. 331, and 7 Taunt. 416, the Court held that the underwriters were discharged.

Nesham v. Armstrong, p. 468. The points reserved in this action were afterwards put into a special case, and argued in Michaelmas Term, 1817. The Court upon the first objection, namely, that all the partners were not examined, were of opinion that this objection was fatal. They said, that the object of the Act was to have the knowledge of all the partners. All should be exempt from suspicion, for they claim a great benefit under the Act. The partner examined, as it appears by the case, only swore that he did not know any of the persons concerned in the demolishing.

He might and ought to have gone further; he might and ought to have pledged his own belief that his partners were likewise ignorant. But the case likewise stated, that two of the partners were there, besides the partner examined; their examination, therefore, should have been taken. In a case where the partners were at a distance, and ignorant of the transaction, their examination might be dispensed with. It might not be necessary that all should be examined; but those who are examined, should negative, to their belief, which is as far as they can go, the knowledge of their co-partners. A verdict was entered for the defendants on the four last counts, and for the plaintiff on the two first.

In *Lowden v. Hierons*, p. 647. a new trial was granted upon the application of the defendant.

Murd v. Brydges, 654; this case was not moved.



AN
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OF THE
PRINCIPAL MATTERS.

A.

ABANDONMENT,

See INSURANCE, 2, 4, 11, 15.

ACTION,

See ASSUMPSIT.

1. In an action on the case for falsely representing the character of another, by reason of which false representation he obtained credit of the plaintiff; it is necessary to prove against the defendant both fraud and falsehood, viz. that the representation which he made was false, and that the defendant knew it to be false at the time he made it. Falsehood without fraud is not sufficient. *Ashlin v. White.* Page 387
 2. A messenger under a commission of bankrupt sues the assignees for his costs and expences, and obtains a judgment against them. One of the assignees pays the debt and costs under the judgment. He has a right to an action of contribution against his co-assignee, and
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is not bound to shew that any funds came into his hands from the bankrupt's estate. *Hart v. Biggs.* Page 245

3. A person who takes in horses to agist, does not, like an innkeeper, insure their safety; he is answerable only in case of negligence. *Broadwater v. Blot.* 547

AGENT,

See PRINCIPAL & AGENT.

AGREEMENT.

1. Where a person binds himself in an agreement to pay a certain sum of money in case of a breach of the terms of it on his part, and it is therein stated "that the sum mentioned is to be considered as liquidated damages," *Semble* that in an action upon the agreement, the jury are bound to give the plaintiff the whole money; and that such sum is not to be considered as a penalty, but as damages ascertained between the parties. *Barton v. Glover.* 43

ASSAULT,

See EVIDENCE. TRESPASS.

ASSUMPSIT,

See STATUTE OF FRAUDS, 1.

1. *A.* contracts to sell to *B.* 50 tons of hemp, to be shipped from *Cronstadt* or *St. Petersburg*; the ship's name to be declared as soon as known, and to arrive before the 31st of *December*. On the 5th *September*, *A.* gives notice to *B.*, that the hemp was shipped on board the *Lively*; on the 20th he sends a second notice, that if the quantity did not come by the *Lively*, he would make it up from the cargo of another vessel. On the 29th, *A.* gives a third notice, that 20 tons would come by the *Lively*, and the rest by another ship. *B.* accepts the 20 tons, but refuses to receive any more. Held, that *B.* was bound to receive the remainder of the hemp, unless he could shew that he had sustained some special damage by *A.*'s non-performance of the precise terms of the contract. *Thornton v. Simpson*. Page 164
2. In an action by the steward of a manor, for a particular rate of fees claimed to be due to him from a tenant on his admission to six several copyhold estates, if he fail to establish a custom for his charges he may, notwithstanding, resort to a *quantum meruit*. Held, afterward, by the court, that where a person is admitted to several distinct copyhold tenements, the steward of the manor is not entitled, without proving a custom, to full fees on each admission, separately; but he may stand on his *quantum meruit*. *Everett v. Glyn*. 1
3. Where the broker makes a mis-

take in the contract, describing, in the bought and sold notes, goods to be sold by *A.*, *B.*, and *C.*, which he believed to be the real name of the firm which employed him; which firm, in fact, from a recent alteration that the broker was not privy to, consisted of *A.*, *D.*, and *E.* only. Held, that the purchaser of the goods was not at liberty to avoid the contract on this account, after having treated the contract as subsisting, upon a subsequent communication from the plaintiffs, unless he could shew that he had been prejudiced, or had lost the benefit of a set-off. *Mitchell v. Lapage*. Page 253

4. Where work is done upon a special contract and for estimated prices, and there is a deviation from the original plan, by the consent of the parties, the estimate is not excluded, but is to be the rule of payment, as far as the special contract can be traced; and for any excess beyond it, the party is entitled to his *quantum meruit*.
Where work is done under a special contract, the plaintiff is not precluded from recovering under the counts for work and labour generally; unless there be something in the terms of the special agreement which, either by stipulation or necessary intendment, prevent him. *Robson v. Godfrey*. 236
5. An action for money had and received will not lie to recover back a sum paid upon trust, for a specific purpose, unless it be shewn that the trust is closed, and that a balance remains in the hands of the trustee. *Case v. Roberts*. 500
6. An auctioneer is not liable to pay interest upon a deposit kept in his

hands, during the investigation of a title. He is to be considered as a mere agent, unless he specially engage as a principal in the sale. *Lee v. Mann*. Page 569

7. *Q.* If tolls can be claimed under a modern grant of liberty to hold a market, &c. and to receive the accustomed dues and tolls, &c., but to which grant no specific tolls are annexed. *Lowden v. Hierons*. 647

ASSUMPSIT IMPLIED,

See ASSUMPSIT, 4.

ATTESTING WITNESS,

See EVIDENCE. WITNESS.

ATTORNIES,

See BANKRUPT, 13.

1. After action brought, the defendant pays the plaintiff the debt and costs in the cause, and takes a receipt for the same. The plaintiff nevertheless proceeds in the action, and the defendant pleads the general issue. The receipt is no defence under this plea, and plaintiff is entitled to nominal damages. *Holland v. Jourdine*. 6

ANIMAL.

1. In an action for keeping a dog accustomed to worry, and which had worried plaintiff's sheep, it is not necessary to prove that the dog had previously worried sheep. If the dog be proved to be generally mischievous it will be sufficient. And the declaration need not be special. *See quere.* 1 Lord Raymond, 110. *Hartley v. Harriman*. 617

AUCTIONEER,

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B.

BAILIFF,

See SHERIFF.

BANKRUPT,

See BROKER, 3. TRUSTEE, 1.

1. If the petitioning creditor be privy and assenting to the execution of a deed by traders, by which they make an assignment of all their property, though such assignment be fraudulent, and an act of bankruptcy, upon which other creditors, not privy and assenting, may sue out a commission, he is estopped; and having assented to the deed, though he did not execute it, he cannot set it up as an act of bankruptcy. *Burrough v. Goech*. Page 13
2. An uncertificated bankrupt may sue as a trustee for his assignees; and the defendant cannot object to the action unless they interpose. If a broker deliver a bought and sold note which materially differ, there is no valid contract. *Cumming v. Roebuck*. 172
3. A trader directs his servant, that if any one should come whilst he was at dinner, or engaged in business, she should deny him. Held, that such instructions did not amount to a direction for a general denial; and, therefore, although a creditor called and was denied, it was no act of bankruptcy. *Shew v. Thomson*. 159
4. A trader having business both in England and Spain, has a right to go to the latter country to look after his concerns; and though his creditors are thereby delayed, it is no act of bankruptcy. But if he likewise goes abroad from the fear of arrest, though it concur with the justifiable motive, that of looking after his foreign business, it is an act of bankruptcy. *Warner v. Barber*. 175
5. A. before his bankruptcy discounts certain bills of exchange with B. and C., his bankers. They gave

him immediate credit for the value of the bills in his account, minus the discount. A balance is likewise struck before the bankruptcy, and, whilst the bills were yet running in favour of *A.*, (when the bankers admit that they have in their hands 934*l.* 8*s.* 8*d.* due to *A.*, giving him credit for the bills then running,) *A.* becomes a bankrupt, and the bills are dishonoured. Held, that in an action against the bankers for the balance admitted to be due to *A.* before his bankruptcy, they have a right to set off against such claim the amount of the dishonoured bills, it being a case of mutual credit under the 5 *Geo.* II. c. 30 s. 28. *Gowen v. Tritton.* Page 408

6. First. In an action of tort against several, if there be evidence against some only, and none against others, it is discretionary with the Judge at *nisi prius*, whether he will direct the acquittal of such defendants, against whom there is no evidence, at the close of the plaintiff's case, for the purpose of making them witnesses for the co-defendants. But such an intermediate acquittal is not a matter which the defendants' counsel can claim of right. Secondly, an uncertificated bankrupt hires a shop; goods are supplied in the name of his son, but principally upon the father's guarantee. Held, that his assignees were liable to an action of trespass at the suit of the son, for seizing them as the goods of the bankrupt. *Davis v. Living.* 275

7. In an action by the assignee of a bankrupt claiming property which the bankrupt is alleged to have had in his possession, order, and disposition, as the reputed owner at the time of his bankruptcy, it is competent for the defendant,

who has paid a valid consideration for the property, to give evidence of a *contrary reputation*, and to resist the claim of the plaintiff under the statute 21 *Jac.* I. c. 19. s. 11. upon those grounds. *Gurr v. Rutton.* Page 327

8. Assignees are not concluded by putting up the premises to sell: they may make an experiment to see if the lease be beneficial. But, in a case where they put up the premises to auction, and found a purchaser, and received a deposit; but the contract of sale afterwards went off, without the assignees shewing any reason why they did not enforce the sale: held, that they were liable to the payment of rent, as "assignees of all the estate and interest, &c. of the bankrupt, in the premises." *Hastings v. Wilson.* 290

9. The petitioning creditor, and not the solicitor, is liable to the messenger under a commission of bankrupt, for the costs and expenses attending it. The solicitor is an agent merely, and is not to be regarded as a principal as respects the messenger: and, although he make himself responsible to the messenger, the petitioning creditor will not therefore be exonerated, without the express consent of the messenger to discharge him. *Hart v. White.* 376

10. *A.* (an officer of the army) retires to the country, where he rents a dwelling house and three acres of land; buys pigs, and consumes part in his family, and sells the rest at a neighbouring market. He makes no shew as a dealer, and is proved not to have bought more than fourteen pigs in any one year. Held, that he was a trader within the bankrupt laws. The smallness of the profit is no consideration, and one act of buying

and selling is sufficient to constitute a trader. *Newland v. Bell.*

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11. *A.* and *B.* are traders; they employ an attorney, who is likewise employed by *D.*, a creditor of their firm, and who afterwards becomes petitioning creditor under a commission of bankrupt issued against them. The attorney advises *A.*, *B.*, & *C.*, to become bankrupts; and, in order to procure an act of bankruptcy, he takes *D.* with him to the respective houses of *A.*, *B.*, & *C.*; having first concerted with them that they should respectively deny themselves when *D.* called. Held, that although *D.* was not privy to such denial, yet, inasmuch as the attorney was the agent of *D.* as well as of *A.*, *B.*, and *C.*, and accompanied him for the purpose of procuring such denials; such denials were fraudulent acts of bankruptcy, and could not support a commission on which *D.* stood as the petitioning creditor. *Prosser v. Smith.* 442
12. A trader may make a transfer of his goods, on the eve of bankruptcy, to a creditor who compels him so to do by any threat; but a voluntary and fraudulent preference is an act moving from the trader, whereby he *elects* to favour a particular creditor. *Reed v. Ayton.* 503
13. An attorney who becomes a general depository of the money of his clients, and of other persons, which he invests upon securities, charging, in addition to his fees for preparing the securities, a compensation (no matter by what name) and who unites this occupation with the business of a conveyancer, &c. is a trader within the meaning of the bankrupt laws. *Hutchinson v. Gascoigne.* 507
14. Where the defendant pleads

his certificate in bar, the plaintiff is at liberty to give evidence of gaming at *Nisi Prius*, in order to vitiate the certificate. The 12th and 7th section of the 5th Geo. II. c. 30. are to be construed as if they were incorporated.

But the plaintiff must confine his evidence to one act, and elect whether he will give evidence of one loss, amounting to 5*l.*, or of several losses, amounting to 100*l.* *Hughes v. Morley.* Page 520

15. Goods sent to a trader upon *sale and return*, in the common acceptance of that mode of dealing, will pass to his assignees, under the statute of 21 James I. *Gibson v. Bray.* 556
16. Where the creditor acts adverse to the views and wishes of the trader, and by urgency and importunity obtains a transfer of property, to cover his liability upon a bill then running, (which bill he had discounted), although such transfer be made on the eve of bankruptcy, it will not be a fraudulent preference on the part of the trader. *Arbouin v. Hanbury.* 575
17. *A.* being indebted to *B.* assigns a ship to *C.* as a trustee for *B.* by way of mortgage. The ship is registered *de novo*, in the name of *C.*, and a certificate of registry put on board; but she is left under the controul of *A.* who becomes a bankrupt. *Quære*.—If she passes to his assignees under the statute of 21 Jac. I. c. 19. ? *Hay v. Monkhouse.* 603

BARON AND FEME,

See LIMITATIONS. STATUTES.

BILLS OF EXCHANGE AND
PROMISSORY NOTES,

See AGREEMENT. INFANT.

1. A promise by letter to accept a non-existing bill is no acceptance of a bill when drawn, unless it be communicated to the person who is to receive the bill, and who is thereby induced to take it. An acceptance is as valid by parole as by writing; and a conditional acceptance is as effectual as an absolute one, if the condition be complied with. *Miln v. Prest.*

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2. In an action by the indorsee of a bill of exchange against the acceptor, it appeared that, after action brought, and notice of trial, the bill, which was indorsed in blank, had been lost. Held that, although the bill had been drawn more than six years, the plaintiff was not entitled to recover without producing it at the trial. *Poole v. Smith.*

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3. The holder of a bill of exchange, which is returned dishonoured, is not bound to send notice to the drawer by the mail, or first conveyance that sets out from the place where such holder resides. It is sufficient, provided there be no essential delay, if he send notice by a private hand; and although such notice should thereby reach the drawer later in the day than if it had been sent by the mail, he will not on that account be discharged. Notice of the dishonour of a bill of exchange given at the counting-house of a merchant or manufacturer, between the hours of six and seven in the evening, is not too late. *Bancroft v. Hall.*

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4. A banker's promissory note is made payable at *Tunbridge*, and likewise at *London*. The holder has a right to present it at either place; and if payment be refused in *London*, it is no defence on the part of those who contend that the

holder has been guilty of laches, to prove, that if payment had been demanded at *Tunbridge*, which was the more convenient and nearer place, the bill would have been paid. *Beeching v. Gower.*

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5. A note beginning "I promise to pay," signed by two parties, is joint and several. A promissory note is signed by *A.*, and subsequently by *B.*, whilst in the hands of the payee, as surety for *A.*: unless such signature of *B.* is in virtue of a previous agreement at the time of making the note, it will be void, without an additional stamp. *Clerk v. Blackstock.*

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6. *A.* in *London*, acts as the agent of *B. and Co.* at *Paris*, for a small commission upon their general business. *B. and Co.* request *A.* to remit them a bill on *Portugal*, which *A.* accordingly does, and indorses it. The indorsement being without qualification, *A.* is liable upon the bill, in an action brought against him by *B. and Co.*

If a bill be drawn payable at so many days after sight, there is no fixed time when it shall be presented to the drawer; and it may be put into general circulation by the holder without a previous presentment.

Seemle, that a presentment must, notwithstanding, be made within a reasonable time. *Goupy v. Harnden.*

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7. In an action against the acceptor of a bill of exchange, made payable at a particular place, by a memorandum at the foot of the bill, it is not necessary to prove a presentment, or demand at that place, but the acceptor is generally and universally liable. *Head v. Sewell.*

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BILL OF LADING,

See STOPPAGE IN TRANSITU, 1.

FREIGHT, 3.

A. has some rum in the *West India* Docks, which he sells to *B.* The rum is to be shipped by *A.* in a vessel chartered by *B.* Before the rum is delivered on board the vessel, *B.* gets a bill of lading from the captain; he then sells the rum in question to *C.*, who pays *B.* for it upon an indorsement of the bill of lading. *A.* being unpaid, and suspecting the solvency of *B.*, takes some part of the rum forcibly from out of the vessel, and countermands the delivery of the rest. In trover by *C.* against *A.* to recover the rum, Held, that *C.* gained no good title under the bill of lading, such bill being *fraudulent*, inasmuch as *B.* procured it to be signed by the captain before the rum was delivered on board the ship. *Osey v. Gardner.* Page 405

BUILDING ACT.

Parties may come to an agreement to dispense with the formalities of the building act. If the occupier of premises, the owner of the improved rent of which is liable to the rebuilding of a party-wall, voluntarily assumes the responsibility by a promise, not in writing, there is a sufficient consideration to support an action on such promise resulting from his occupation of the adjoining premises; and this is evidence to be left to the jury that he is owner of the improved rent, especially in a case where there is evidence of his having subsequently offered his lease to sale for a sum of money in gross. *Stewart v. Smith.* 321

BREACH OF PROMISE OF MARRIAGE.

In an action against a woman, for a breach of promise of marriage, it is a sufficient justification for non-performance, if the person to whom she has given the promise, turn out, upon inquiry, to be a man of bad character; but mere accusation and suspicion are not sufficient. The charges which she makes against him must, if capable of proof, be substantiated, or they go only to the damages. *Baddeley v. Mortlock.* Page 151

BROKER,

See PRINCIPAL AND AGENT. INSURANCE, 10.

1. It is not necessary that a broker should insert the name of his principal in a contract which he makes for him. It is sufficient, if, upon a demand of his contract-book, he be ready to produce it, and the name of his principal be recorded there.

Semble, if a broker make a contract contrary to the regulations of the city of *London*, and in violation of the bond into which he has entered with the mayor, aldermen, &c., he is not, therefore, disqualified from bringing an action on a contract so made in contravention of his duties under the bond. The remedy against him, is an action for the penalty of the bond, and the contract is not *ipso facto* void.

The course of dealing between the principal and the broker may authorise the latter to make contracts for the principal, in his, (the broker's,) *own name*, which will bind the principal to a performance. *Kemble v. Atkins.* 427

2. An insurance broker is not enti-

tled, upon the ground of any usage of trade, to a commission of 12 *per cent*, on the balances which he pays over to the underwriters who employ him. Such allowance, however general it has been, is a *gratuity* merely, and not a demand of right; nor can it be claimed, but upon the footing of contract, either express or implied, between the parties. *Levi v. Barns. P. 412*

3. *A.* is employed by *B.* and *Co.* as their broker. He sells goods, the property of his principals, lying in the *London docks*, to *C.*, and draws a bill of exchange in his *own name*, which *C.* accepts for the amount, and pays. *A.* becomes a bankrupt; *B.* and *C.* disavow the transaction, and call upon *C.* for payment. *C.* refuses to pay, alleging that he had already paid the broker, and brings trover for the goods against *B.* and *Co.* and the treasurer of the *London docks*. Held that, inasmuch as *B.* and *Co.* had suffered their broker, upon *some occasions*, to draw bills in his own name, without mention of them as his principals, they were bound by the payment which had been made to him by *C.* in the present case; that the action will lay against *B.* and *Co.*, but that the treasurer of the Dock company was entitled to an acquittal. *Townsend v. Inglis.*

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C.

CARRIER,

See STOPPAGE IN TRANSITU, 4.

1. Though a carrier may, by law, limit his responsibility, a notice of certain limitations on his general liability, suspended at the *termini* of his journey, will not attach

upon the delivery of goods at intermediate places, where no such notice is given. *Gouger v. Jolly.*

Page 317

2. A carrier who restricts his liability, is, notwithstanding, answerable in cases of negligence; the degree of which is a question of fact for the jury. *Smith v. Horne.*

644

CERTIFICATES, (PROFESSIONAL.)

Persons required to take out certificates under the 55th of *Geo. III.* c. 184, *sched. A.* part 1., title, *Certificate*, are only persons being members of the four inns of court. *Edgar v. Hunter.*

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CERTIFICATES, (BANKRUPTS'.)

See BANKRUPT, 14.

CASE,

See ACTION.

CHARTER-PARTY,

See COVENANT, 1, 2.

- A.* charters a vessel, and covenants to supply a full and sufficient cargo of certain commodities, (describing them;) and, amongst others, of cotton, the freight of which was to be paid for, at certain prices per lb. for round bales, and different prices for square or compressed bales. He furnishes a cargo of compressed bales of cotton, but neglects to have the cotton re-compressed, according to the usage of the trade, and the custom of the country whence it was imported. In consequence of this omission, the vessel has not a full and sufficient cargo, as estimated upon the bales if they had been re-compressed; though her cargo would have been full and sufficient, if the cotton had been

stowed *only* in a *compressed* state. Held, that *A.* was liable for dead freight, and that it was his duty to have furnished the cotton in re-compressed bales, notwithstanding the words of the charter-party. *Benson v. Schneider.* Page 416

COVENANT.

1. In an action of covenant on a charter-party, in which the defendant covenanted "that the vessel should be sufficiently furnished with every thing necessary and needful for the voyage in question," which was to *Cagliari*, in *Sardinia*.—Held, that it was her duty to leave a bill of health on board; and the plaintiff having been put to great inconvenience and expence on account of the ship not being provided with such document, that the defendant was responsible for the loss occasioned thereby. *Levy v. Costerton.* 167
2. In an action of covenant upon a charter-party for freight, it is no defence that the plaintiff received part of the freight in money from the defendant's agent abroad, and the residue in a bill (without the privity of the defendants) drawn by the agent upon, and accepted by, certain merchants at *London*; and which bill was afterwards dishonoured upon the insolvency of the drawer and acceptors. But the defendants are still bound to pay the freight owing to the plaintiff; and such bill is not to be deemed payment, though defendants were not informed of the transaction until after the failure of the parties to it. *Marsh v. Pedder.* 72
3. Where freehold premises are upon lease, and there are several interests, *viz.* tenant for life, remainder in tail, and the reversion in fee; and there is a breach of covenant

which gives the tenant for life a right of action, he can only recover such damages as are commensurate with the injury done to his life estate, and not the damages which may be sustained by the reversioner. *Evelyn v. Rad-dish.* Page 543

CONVOY ACT,

See INSURANCE, 3.

D.

DEED,

See EVIDENCE.

DEFAMATION,

See SLANDER, 2.

DEPOSITIONS,

See EVIDENCE, 4. WITNESS.

DEBT ON BOND.

Where to debt on bond the defendant pleaded, that 1,100*l.* was due, and no more, and undertook to discharge himself therefrom by a set-off, and the plaintiff replied, generally, that a larger sum was due, to wit, the sum of 1,750*l.*—Held, that the plaintiff was bound to prove that more than 1,150*l.* was due. *Bell v. Shaw.* 293

DISTRESS,

See REPLEVIN.

DONATIO MORTIS CAUSA.

1. *Quære*, whether a gift of a chattel, not in the possession of the donor at the time of making the gift, will so pass the property therein as to entitle the donee, who has never obtained possession, to maintain trover against the executor of

the donor. If *A.*, on his death-bed, desire *B.* to call at a certain place, and fetch away a watch, adding, "that he will then make her a present of it;" but no possession is resumed by *A.* and no delivery made to *B.* *Quære*, if this would be good as a *donatio mortis causá*. *Spratley v. Sir H. Wilson*, Knt.

Page 10

2. To make a gift valid as a *donatio mortis causá*, actual delivery of possession is necessary, and a symbolical delivery is not sufficient; therefore, where *A.*, considering himself dying, takes certain property out of an iron chest, and writes the names of the plaintiffs upon an envelope containing it, declaring it to be his intention that they should have such property upon his death; and, after having superscribed the envelope with their names, returns it to the chest, and keeps the keys in his own possession, never making any actual delivery thereof to the plaintiffs themselves, or to trustees for them: Held, that such a gift, or designation of the property, was not good and effectual as a *donatio mortis causá*. *Bunn v. Markham*.

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DOCK WARRANT.

A. having some coffees in the *West India Docks*, employs a broker to sell them; the broker informs him that he has found a purchaser, and requires to be put in possession of the dock warrants. *A.* delivers them to the broker, indorsed in blank, upon receiving his (the broker's) check for the price of the coffee. The broker then sells the coffee to the plaintiffs, and receives immediate payment upon handing over the dock warrants. The broker's check, given to *A.*, is dishonoured, and

A. immediately stops the goods in the dock warehouse.—Held, that the plaintiffs had a right to recover in trover against *A.* on the ground that the delivery of the dock warrants by the broker to the plaintiffs, upon payment made to him, constituted a complete transfer by the custom and usage of trade; and defeated the right of stoppage *in transitu*. *Zwinger v. Samuda*. Page 395

E.

EJECTMENT.

1. A lease for a year to *A.* and his wife will support a release to *A.* and a third person. *Saunders v. Cooper*. 461
2. In an ejectment for premises, where the lessor of the plaintiff is the party in the original action in which the execution issues, he is bound not only to produce the writ of *feri facias*, under which the sheriff has sold, but likewise the judgment. *Bland v. Smith*. 589

ESCAPE,

See SHERIFF, 3.

EVIDENCE,

See BANKRUPT. BILLS OF EXCHANGE. INSURANCE. LIBEL. VARIANCE. WITNESS.

1. Although comparisons of hand-writing is not admissible evidence, when the fact to be proved is the hand-writing of a particular person, whose supposed signature is upon a paper put into the witness's hand; yet, if such witness has a document, to which is affixed the hand-writing of that person, (as to whose signature the question arises) and which docu-

ment he knows to have his genuine subscription, he has a right to recur to it for the purpose of refreshing his memory : a basis being first laid in his having *once* seen the defendant sign his name, though he had forgotten the character of his hand-writing. *Burr v. Harper.* Page 120

2. Upon a *subpœna duces tecum*, a witness is bound to produce a paper which he has in his actual custody, though the legal right and property in such paper belong to another. The Court, however, in all such cases will exercise their discretion, in deciding what papers shall be produced ; and under what qualifications, as respects the interest of the witness. Such witness is bound to produce them, though there be a regular way prescribed by law for obtaining such documents. *Corsen v. Dubois.* 239

3. A book in which leases were enrolled, and which was kept in the office of the auditor of the Bishop of *Durham*, (such officer holding a patent office in the county palatine) held to be admissible evidence to sustain the claims of a lessee of the Bishop of *Durham*, the original and counterpart of the lease being lost. *Humble v. Hunt.* 601

4. In a trial for murder, the deposition of the deceased should be taken in the presence of the prisoner ; but if such deposition be taken in the absence of the prisoner, and be afterwards read over to the deceased, in the presence of the prisoner ; and the deceased assents to the truth of it, this will make the deposition evidence against the prisoner. *Rex v. Smith.* 614

F.

FACTOR,

See PRINCIPAL AND AGENT.

EVIDENCE.

FRAUDS, STATUTE OF.

1. *A.*, an agent for some manufacturers, sells to *B.*, who likewise acted as an agent, a quantity of shoes, and receives certain bills of exchange in payment. *B.* being pressed to indorse them, refuses ; but writes a letter to *A.*, in which he incloses the bills ; and adds, " that should they not be honoured when due, he (*B.*) would see them paid."—Held, that this was a sufficient agreement within the fourth section of the statute of frauds, to bind *B.* to pay for the goods, in default of his principal. *Morris v. Stacey.* Page 153
2. The delivery of a sample, which is no part of the thing sold, will not take a sale out of the statute of frauds ; but if the sample be delivered as part of the bulk, it then binds the contract. *Talbot v. West.* 178

FRAUDULENT ASSIGNMENT,

See BANKRUPT, 11.

FREIGHT,

See INSURANCE.

1. A general ship took some silk on board to carry from *Rotterdam* to *London* on defendant's account. On the margin of the bill of lading was written, " the consignee

to clear the goods in fourteen running days after her arrival in port, or to pay 4*l.* *per diem*, for demurrage." The vessel was ready to deliver on the 3d of October. Defendant applied for, and was ready to receive his goods within the running days; but, being undermost in the vessel, delivery could not be made till the 22d.—Held, that the plaintiff was entitled to recover demurrage, though he did not deliver the goods within the time allowed, being prevented by other goods, belonging to other consignees, which overlaid them. *Harman v. Gaudolphin*. Page 35

2. Goods shipped from abroad, and consigned to a merchant in this country, are to be paid for (upon a demand for freight) according to their *net* weight, as ascertained at the King's landing scales, and not according to the weights expressed in the bill of lading, unless there be a special contract so to pay for them.

If the consignee, to get his goods delivered to him, pay more than the net weight amounts to, he may recover back the surplus in an action for money had and received. *Geraldes v. Donison*. 346

3. *A.* undertakes to smuggle certain goods, belonging to *B.*, into Russia. A regular bill of lading is made out of the goods, in which the freight charged is the usual freight according to the bulk of the goods. But a second contract is made between the parties, by which *B.* undertakes to pay *A.* a large sum of money, if the goods should be safely landed in the foreign port. The goods are landed; *B.* pays the freight under the bill of lading, and likewise part of the money under the agreement, but refuses to pay the

remainder.—Held that, notwithstanding the bill of lading, he was liable to pay the residue as *extra* freight.

Extra freight may be recovered under a common count for work and labour, &c. *Hedley v. Lepage*. Page 392

4. Where a ship is freighted in contravention of the navigation laws, although the consignee accept the goods, and sell them, he is not answerable in an action for the freight. *Blank v. Solly*. 554

H.

HIGHWAY.

1. Though the right of the soil in a public highway belongs to the owner of the adjoining closes (when no other proprietor appears) *usque ad filum viæ*; this is only a presumption of law in his favour, when the original dedication of the road cannot be shewn by positive evidence. And if there are circumstances in the case which bring this presumption of property in question, the plaintiff, who claims such road in an action of trespass, must give some other evidence of property beyond the mere presumption of law. *Headlam v. Headley*. 463
2. A right of way for agricultural purposes is a limited and qualified right of way, and does not, necessarily, confer a right to use such way for general and universal purposes. Therefore, where *A.* claimed and proved a right to carry corn and manure over the *locus in quo*,—Held, that he had not, therefore, a general and unlimited right to carry lime, or the produce of a quarry, over the *locus in quo* at all times, and for all purposes. *Jackson v. Stacey*. 455

I.

INFANT.

A lieutenant in the royal navy, under the age of twenty-one, is not answerable for the price of a chronometer, in an action, to which he has pleaded his infancy; and the replication is, necessities. *Be-rolles v. Ramsay.* Page 77

INDICTMENT.

Where property is stated in one count to belong to certain persons, naming them specifically, but in another count to belong to persons *unknown*, and the prosecutor, by defect of evidence, cannot prove the names of the persons as described in the first count, he cannot recur to the second count, which describes the property as belonging to persons unknown. *Rex v. Robinson.* 595

INSURANCE.

1. A policy of insurance (against fire,) is effected on the stock and utensils of a sugar-house, the different stories of which were heated by a chimney running up to the top. By the negligence of the plaintiff's servants in omitting to open the register, the heat is considerably increased, by means of which large quantities of the sugar are spoiled; but no damage was occasioned to any thing but the sugar, and no greater fire existed than on ordinary occasions. Held. that this was not a loss within the policy. *Austin v. Drew.* 126
2. Where, in a policy of insurance on goods, the vessel is wrecked, part of the goods are lost and part got on shore; but, (whilst on shore,) are destroyed and plundered by the inhabitants of the coast, so that no portion of them comes again into the possession of the assured. Held, that this is a loss by perils of the sea, and no abandonment was necessary. *Bondrett v. Hentigg.* Page 149
3. A vessel may deviate somewhat from the straight line of her track to seek for convoy; and the captain, unless expressly prohibited by the terms of the policy, may always do, when insured, whatever it would be expedient for the common security to do if uninsured.

Ships sailing from foreign ports are not within the convoy act, unless there are persons at those ports authorised to grant convoy or licences. And it is not sufficient to shew that convoys have been actually appointed from those ports, but proof must be given that there are persons stationed there legally authorised by the Admiralty to appoint them. *D'Aguilur v. Tobin.* 185
4. If a ship, by bad weather, be compelled to put back to her loading port, and, upon examination of her cargo, it is found not to be in a fit state to send forward to its original destination, and altogether unsuited to the market from sea damage, the insured is entitled to abandon. Afterwards held by the court, that he was entitled to a reasonable time for examining the state of the cargo before he made his election to abandon. *Gernon v. Royal Exchange Assurance.* 49
5. A licence granted to a ship to sail in ballast from *London to Holland*, (which country was at that time in a state of hostility,) notwithstanding any thing contained in his Majesty's order of Council of *April, 1809*, held not to protect a ship which was the property

- of an alien enemy. An insurance, therefore, on such vessel is void. *Gregg v. Scott.* Page 129
6. A vessel with liberty to chase and capture prizes, has some *Spanish* prisoners on board. By means, which did not appear, they break loose, rise upon, and imprison the crew, with the exception of one sailor, who is heard upon deck in conversation with them. The captain and crew, with the exception of this sailor, are put on shore; and the *Spaniards* run away with the ship. Upon a loss, alleged to be by barratry of the mariners, this is evidence to be left to the jury that such barratry was committed. Where a vessel, engaged in the Southern whale and seal fishery, and with liberty to chase and capture prizes, is insured in *August*, 1807, with a retrospect to the 1st of *August* 1806, although, at the time of her insurance, she was not competent to pursue all the purposes of her voyage, her crew being reduced by death and casualties; if she had a competent force to pursue any part of her adventure, and could be safely navigated home, she is to be deemed sea-worthy. *Hucks v. Thornton.* 30
7. Where the assured claims and receives the return premium due upon the arrival of the vessel, and the policy is adjusted upon that footing, he cannot, without an express stipulation, resort again to the underwriter in any contingency of the adventure. *May v. Christie.* 67
8. The words, "all sorts of wool," in 43 *Geo. III. c. 155, s. 13*, do not include cotton wool; especially when the words wool and cotton wool are used in another clause, and in the same section of the act, as distinct commodities.
- Therefore, the importation of cotton from *Amelia* island, in a *Portuguese* vessel, owned by a *British* subject, the captain and crew of which are *Portuguese*, is contrary to the navigation act. The 55th *Geo. III. c. 8.* is not an exposition of the 42d. *Pearce v. Cowie.* P. 69
9. A general ship is freighted by several merchants, and sails upon her voyage; she parts with her convoy in a gale of wind, and is afterwards attacked by an American privateer, which she engages and beats off, with the loss of one man killed and four wounded; her hull and rigging are likewise damaged in the conflict; but she reaches her port, and delivers her cargo safely. Held, that the repairs of the ship, and the expences of curing the wounded sailors, are not, under such circumstances, a subject of general average. *Taylor v. Curtis.* 192
10. *A.*, a merchant, employs *B.* to effect some policies of insurance; *B.*, unknown to *A.*, employs *C.*, who applies to the defendants, who are insurance brokers. *C.* gives the defendants no reason to suppose that he was not acting as a principal, and they effect the policies in their own names, as agents. At the time of this transaction, *C.* was indebted to the defendants on a balance of accounts. In an action brought by *A.* to recover the policies, on tendering the premium and expences, Held, that the defendants had a lien upon them until *C.*'s debt was satisfied. *Westwood v. Bell.* 122
11. A vessel is driven into a port, where there is no dock to receive her; it appeared that she had suffered so much by sea perils, that, upon examination and survey, it was judged expedient to break her up, and to sell her for old timber.

Held, in an action on the policy, that the assured was bound to abandon before he could call upon the underwriters for a total loss, the ship not being a wreck, but, however maimed and damaged, existing in *specie* as a ship. *Bell v. Nixon.* Page 423

12. It is the duty of the assured, not only to communicate to the underwriter articles of intelligence which may affect his choice, whether he will insure at all, and at what premium he will insure; but, likewise, all rumours and reports which may tend to enhance the magnitude of the risk.

The opinion of underwriters, whether, upon certain facts being communicated to them, they would have insured or not the particular voyage, cannot be received as evidence. The materiality of the intelligence or rumours, which the assured is charged with having suppressed, is a question for the jury, under the circumstances of the case, and ought not to rest upon the opinion of mercantile men. *Durrell v. Bederley.* 283

13. A policy of insurance is altered by striking out the words in the body of the policy, which contained a warranty to sail at a certain time, and inserting a memorandum of an enlarged time in the margin. Some of the underwriters consented to the alteration, but the defendant did not consent. In an action upon this policy, Held, that the alteration did not avoid the policy. *Sed quære.* *Fairlie v. Christie.* 331

And see *Memoranda* 679

14. Sugars are insured, free of particular average. The whole cargo, consisting of 54 hogsheads, is so far damaged by sea-water, that the amount of what is safe and

undamaged, as collected from the several hogsheads, does not exceed one entire hoghead. In an action against the underwriter for a total loss,—Held that the memorandum in the policy, *free of particular average*, protected him from all liability. *Hedbergh v. Pearson.* Page 349

15. There is no fixed rule of law with regard to the time, after which a missing ship shall be reputed to be lost. It is, in all cases, a question of presumption to be governed by the circumstances of the particular case.

If a ship, for which the underwriters, (when a demand is made upon the policy,) have paid as for a lost ship, should chance to *turn up*, she is to be considered as abandoned, and will belong to the underwriters. *Houstman v. Thornton.* 242

16. In effecting a policy of insurance, a circumstance of intelligence, inserted in *Lloyd's Lists*, need not be communicated to the underwriters, however important it may be to the computation of the risk; for it is to be presumed within their knowledge, and to have been taken into account. *Friere v. Woodhouse.* 572

INSURANCE BROKER,

See PRINCIPAL AND AGENT.

1. A broker is not entitled to set off returns of premium, which became due after the death of an underwriter, in an action brought against him by the executors of such underwriter. *Houston v. Robertson.* 88
2. Where A., at Malaga, directs, by letter, his broker in London, to insure 1000*l.* on goods, shipped

on board the *Pearl*, from *Gibraltar* to *Dublin*; and in the conclusion of his letter adds, "I take the risk on myself from this (*Malaga*) to *Gibraltar Bay*, where I shall send my letters on shore." Held, that the broker was liable to an action for negligence, in not stating in the policy that the goods were loaded at *Malaga*. *Park v. Hammond*. Page 80

INNKEEPER.

1. An innkeeper who has a licence to let post-horses, is not bound by the common law to furnish them to a traveller, though he have a chaise and horses at liberty at the time of the application, and though a reasonable price be tendered to him for the hire. *Dicas v. Hides*. 307
2. If a guest demand, and have exclusive possession of a room, for the purpose of a shop or warehouse, he exonerates the landlord from any loss he may sustain in the property which he keeps in that apartment: but if he have not an exclusive possession, the landlord is liable. *Curtin v. Packwood*. 209

INTEREST,

See ASSUMPSIT, 6.

JUSTICE OF PEACE.

1. A person who has qualified for the office of a justice of peace, and acts as such, must have a clear estate of 100*l.* per annum, in law, or in equity, for his own use, in possession.
2. In an action against a person for the penalty given by the statute 18 Geo. II. c. 20, for acting as a ma-

gistrate without a proper qualification, no notice of action is necessary under the provisions of the 24th Geo. II. c. 44. *Wright v. Horton*. Page 458

L.

LANDLORD AND TENANT.

A custom for the tenant of a farm, in a particular district, to provide work and labour, tillage, sewing, and all materials for the same, in his away-going year, and for the landlord to make him a reasonable compensation for the same, is valid in law, notwithstanding the farm is held under a written agreement, provided such agreement does not, in express terms, exclude the custom. *Senior v. Armitage*. Bart. 197

LIBEL.

Communications which take place between the governor of a distant province and his attorney-general, are confidential; and if a witness is interrogated as to their substance in a court of justice, he is not bound to answer any questions respecting them.

In an action on a libel to which the general issue is pleaded, and where there is no justification, the defendant may give in evidence in mitigation of damages, not only that there were rumours and reports, of the same tenor as the libel, previously current, but that the substance of the libellous matters had been published in a newspaper; and he is not required to lay a basis for this evidence, by producing such newspaper at the trial.

The delivery of a pamphlet by the governor of a distant province

to his attorney-general, not for any public purpose, but in order that he might pursue it, is such a publication as will make him responsible in an action, if the pamphlet be a libel.

In an action against a governor of a colony by the surveyor general, who held that appointment in the colony, (such office being an office at will,) for suspending him maliciously, and without probable cause, it is necessary for the plaintiff to prove express and positive malice. *Wyllie v. Govt.* Page 299

LIEN.

1. In an action of trover against the defendant, for not delivering some wine deposited with her by way of security for an advance of money. Held, that it was not sufficient evidence of a conversion, to shew that her son, who acted as her general agent, refused to give it up; and that it was necessary to prove, that such agent acted under a special direction, in order to make the defendant liable.
2. If goods are deposited as a security for a loan of money, such deposit constitutes something more than the right of lien; and it is to be inferred that the contract between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit. *Pothamer v. Dawson.* 383

LIMITATIONS, STATUTE OF.

The admission of the wife, who was accustomed to conduct her husband's business, is sufficient to take the case out of the statute of limitations in an action against the
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husband. *Anderson v. Sinderson.* 391

M.

MASTER AND SERVANT.

1. A and B. are partners in the business of public carriers; by a contract between them, A. finds horses and drivers for certain stages, and B. supplies them for the remaining stages. They are, notwithstanding this division of the concern between them, responsible for the misconduct and negligence of their drivers and servants throughout the whole distance. And it is no defence to B., that the servant by whom an injury is committed, was the special servant of A., and hired and paid by A. alone. *Weyland v. Ekins.* 227
2. The act of the servant will not bind the master in actions of tort to the same extent as in actions in contracts. *Harding v. Greening.* Page 531

MONEY HAD AND RECEIVED,

See ASSUMPSIT AND ACTION.

N.

NAVIGABLE RIVER,

See BENNETT v. MOITA, 359.

NEGLIGENCE,

See ACTION.

NEUTRALS,

See ALIEN ENEMY. INSURANCE.

O.

ORDER, (JUDGES')

See PARTICULAR.

P.

PARTICULAR OF DEMAND.

The defendant cannot make, at the trial of the cause, any such objection to the particulars, which, if made earlier, the plaintiff or the court might have rectified. *Love-lock v. Cheveley*. Page 562

PARTNERS.

1. An authority to execute a deed must be by deed; and if one partner acknowledge that he gave another partner authority to execute a deed for him, the presumption is, that it was a legal authority, which must be under seal and produced. An acknowledgment is not sufficient. *Steiglitz v. Egghon*. 141
2. First, Upon the dissolution of a partnership, and a mutual statement and settlement of accounts, there is an implied promise in law, on the part of him against whom a balance is found, to pay his co-partner; and an express promise to pay is not necessary. Secondly, A partnership is commenced by articles unsealed, in which is contained an agreement for a co-partnership deed. Such partnership may, at any time, be dissolved by parol: and, although one partner refuse to sign the deed, when tendered to him, he is not thereby precluded from recovering a balance due to him on the partnership account in an action of as-

sumpsit. Rackstraw v. Imber.
Page 368

PATENT.

1. A patent is void, First, If the specification omit any ingredient, which, though not necessary to the composition of the thing for which the patent is claimed, is a more expeditious and beneficial mode of producing the manufacture; and, Secondly, If, previous to the patent being granted, the article has been publicly vended, (though only four months,) by the patentee himself. *Wood v. Zimmer*. 58
2. First, *Semble*, that the patent should be a general index to the specification, and state, in substance and outline, what is thereafter set out in circumstance and detail in the specification. Secondly, *Semble*, That if a patent be taken for more of machine than is strictly the inventor's own addition or improvement, it is good. *Hill v. Thompson and Others*. 636

PAYMENT OF MONEY INTO COURT,

See ASSUMPSIT.

PENALTY,

See AGREEMENT, 1.

PLEADING,

Vide *BELL v. SHAW*, 298.

POLICY,

See INSURANCE. BANKRUPT.

PRACTICE,

See PARTICULARS, AND WITNESS.

PREMIUMS OF INSURANCE,

See INSURANCE.

PRINCIPAL AND AGENT.

1. *A.* and Co. of *Liverpool*, employ *R.* and Co. as their bankers there. *R.* and Co. keep an account in *London* with *J. & L.* But *A.* and Co. have no account with *J.* and *L.* *A.* and Co. direct their agents in *London* to pay monies "to their account," at the house of *J.* and *L.* As *A.* and Co. had no account of their own with *J.* and *L.*, but through the medium of *R.* and Co. of *Liverpool*; and, as their agents had been in the habit of paying monies of *A.* and Co. to the account of *R.* and Co. at the house of the *London* bankers of *R.* and Co. Held, that the direction of *A.* and Co. to their agents, to pay to "their account," was sufficiently complied with, by a payment made to the account of *R.* and Co., as the agents had been in the habit of doing. *Breed v. Green.* Page 204
2. A broker is a witness to prove a contract; but in an action brought against the principal, for negligence and misconduct in the course of his employment, in the purchase of certain bales of tobacco, the broker who made the contract for him cannot be called to prove that there was no negligence or misconduct in the execution of it, without a release from the principal. *Gevers v. Mainwaring.* 139
3. *A.* accepts a bill made payable at the house of the defendants, which is indorsed to the plaintiffs, who discount it. The bill is presented to the defendants, when due, and dishonoured. Two days afterwards, the money to take up the bill is remitted to the defendants; and they are requested to follow it in whatsoever hands it may be. They tender the money to the plaintiffs, who had sent back the

bill, the day before, to the drawers. Meantime, the defendants receive an order from a house, to which the letter inclosing the remittance referred them for advice, to hold the money to the credit of that house, as they had, by the desire of *A.*, the acceptor, advanced him to the amount of the money then in the defendant's hands for the purpose of taking up the bill. Held, that this was a sufficient countermand of the money on the part of *A.*, and that the defendants were not liable to an action for money had and received, brought by the plaintiffs, on their again getting back the bill into their possession. *Stewart v. Fry.*

Page 372

4. A letter written by an agent (though not known to be such by the party to whom the letter was written) speaking of a ship, as *his own ship*, is not conclusive against him in an action on a policy of insurance, in which the question of ownership is raised. He may still prove that he is only an agent, and that others are, in fact, the owners of the vessel. *Tullock v. Boyd.* 487

PRINCIPAL AND SURETY.

1. The neglect of the obligee to give notice to the surety, that the principal had made default, does not discharge such surety; but if the obligee (without the privity of the surety) enter into an engagement with the obligee, and deprive himself of the power of suing him, whereby the surety is prosecuted from coming into a court of equity for relief, he is then discharged; but not otherwise. *Orme v. Young.* 84
2. A bond is given to *A.*, *B.*, and *C.*, by the plaintiff and defendant,

who were sureties for *D.* The plaintiff is obliged to pay the bond, and brings an action against his co-surety for contribution. A defence is set up, that the principal had paid money, specifically on account of this bond, to one of the obligees, and that such obligee had carried it to the account of the bond. Held, that any declaration of the obligee, upon *what* account he received the money, or how he had applied it, (unless such declaration were made at the time of payment,) was not evidence; and that such obligee must be called as a witness.

3. Though time given to the principal will, under certain circumstances, exonerate a surety; yet time given to a surety, without the privity of his co-surety, will not, upon his paying the debt, affect his right of action for contribution against such co-surety. *Dunn v. Slee.* Page 399

PRIZE.

1. Where a ship is seized by the commander of one of his Majesty's vessels as prize, and is afterwards released without any suit being instituted against her, if the plaintiff have any ground of complaint, his redress is in a Court of Admiralty; and no action can be maintained at common law, either of trespass for seizing the ship, or of false imprisonment for confining the captain and mariners. *Faith v. Pearson.* 113

PROMISSORY NOTES,

See BILLS OF EXCHANGE.

1. In an action against the payee of a promissory note, who was likewise the indorser,—Held, that his indorsement was an admission of the hand-writing of the maker.

2. The payee is entitled to notice of the dishonour of the note, although there were no consideration between him and the maker. *Free v. Hawkins.* Page 550

Q.

QUANTUM MERUIT,

See ACTION.

R.

RENT.

The fourth section of statute 11 Geo. II. c. 19. which, in the case of goods carried away to avoid payment of rent, gives a summary remedy before two magistrates, provided the value of the goods shall not exceed 20*l.*, does not take away the jurisdiction of the king's superior courts. *Horsefall v. Davy.* 147

RELEASE,

See WITNESS.

REPLEVIN,

See RENT, 1.

1. In an action of replevin, the landlord's title under which the tenant has gained possession of the premises, cannot be disputed, although the tenant is prepared with evidence to shew, that the premises have been fraudulently conveyed to the landlord, and that the actual title is vested in another person. The plea of *nil habuit*, &c. cannot be pleaded, nor can evidence be given which amounts to it. *Parry v. House.* 489

RIGHT OF WAY,

See HIGHWAY, 2.

RIOT ACT.

1. In an action on the riot act, and upon the 52d Geo. III. c. 130. against the hundred,—Held, that burning, though specifically mentioned in a clause of the statute, as distinct from a demolishing or pulling down, is included in the latter terms. *Quære*, If a staith, which is a place of deposit for coals, is an erection, building, or engine, within the meaning of the first and second sections of the 52d Geo. III. c. 130. *Nesham v. Armstrong*. Page 466

S.

SALE,

See STATUTE OF FRAUDS, 2.

SEDUCTION, ACTION FOR.

In an action brought by a parent for the seduction of his daughter, it is not necessary, to sustain the action, that the daughter should be produced as a witness at the trial. *Farmer v. Joseph*. 451

SCRIVENER,

See ATTORNEY AND BANKRUPT.

An attorney whose principal business is in the transaction of annuities, for which he charges a commission, and who, in the course of obtaining them for those who employ him, receives large deposits of money, which he pays into a banker's hands in his own name, is not a scrivener within the bankrupt laws. *Hurd v. Brydges*. 654

SEAWORTHINESS,

See INSURANCE, 6.

SHERIFF.

1. Where a debtor is discharged under the Insolvent Act, his property is vested in the clerk of the peace, until assignees are chosen, and afterwards in his assignees; and although he be permitted to continue in the possession of his property, and to act as ostensible owner, no creditor can take his goods in execution, and compel the sheriff to make a sale. His remedy is to obtain a distribution under the Act; or, in case of fraud, to apply to have the discharge set aside. *Hindle v. Bell*. Page 161
2. In an action against the sheriff for an escape, the regular way of connecting him with his officer, so as to make him responsible for his act, is by the production of the warrant. But any recognition by the sheriff, that the officer acted under his authority, will dispense with the necessity of producing it. An indorsement upon the writ, (returned and filed by the sheriff) of the name of the officer, is not sufficient to make the sheriff responsible, without proving that his name was written upon it by the authority, or with the privity, of the sheriff. The writ, with the sheriff's return upon it, is only evidence against him, to the extent of his duty under it; and it is no part of his duty to annex the officer's name to the return. *Hill v. Leigh*. 217
3. It is sufficient to excuse the sheriff, in an action against him for a false return, "that the defendant forcibly rescued himself," provided the fact be so: but if the defendant escape, owing to the

negligence of the officer, this will not justify the return of a *rescue*.
Fermor v. Phillips. Page 537

SHIP.

1. *A.*, *B.*, and *C.*, are part owners in a ship. *A.* directs *B.* and *C.* not to order any repairs in their joint names, and informs them that he will no longer consider them as managing owners. Repairs were done in their joint names, upon the direction of the captain employed by *B.* and *C.* Held, that *A.* was jointly liable. *Gleason v. Tinkler.* 586

SLANDER,

See LIBEL.

1. In an action for slander, it is not competent for the defendant, under the general issue, to offer, in mitigation of damages, evidence that the specific facts in which the slander consists, and for which the action is brought, were communicated to him by a third person. *Mills v. Spencer.* 533
2. No action can be maintained against a counsel, for words spoken in a judicial proceeding, provided they are pertinent to the cause, and that no malice against the individual who is the subject of the words be proved against him. *Hodgson v. Scarlett, Esq.* 621

STAGE COACH,

See CARRIER.

STATUTES,

See SHIP, 1.

1. Notwithstanding there has been no notice to dispute commission, act of bankruptcy, &c. under the

46 *Geo. III. c. 135. s. 10.* the proceedings are not conclusive evidence of the facts therein stated; but the Court is still to form a judgment upon them, whether they prove an act of bankruptcy or not. *Riorden v. Forrestall.* Page 190

2. *A.* contracts to sell to *B.* some Russian hemp; and the ship, on board of which the hemp is to be conveyed, is to sail from *St. Petersburg* by a given day. *A.* is the importer of the hemp. By the stat. 10. and 11. *W. III. c. 6.*, it is illegal for any subject of this realm to carry on a trade with *Russia*, unless he be a member of the fellowship of merchants trading to those countries. *A.* is not a member of the company; but the hemp is protected at the landing scale and in the docks, by using the name of a broker, who was one of the fellowship. *Quære*, If this be such an illegality in the contract as will render it void, and entitle *B.* to avail himself of it, as a defence to an action brought against him by *A.* for not fulfilling his agreement. *Gross v. La Page.* 105
3. *A.* and Co. guaranteed to *B.* and Co. payment for any goods which they might supply to *C.* within a certain period, at a credit of two and two months. *C.* becomes indebted to *B.* and Co. for goods, and gives them three bills of exchange, in payment, indorsed by *A.* and Co., who shortly afterwards become bankrupts. One of these bills was dishonoured before, and the other two bills after, their bankruptcy. *C.* was likewise indebted to *B.* and Co. before the bankruptcy of *A.* and Co. for some goods, for which they had a right only to call on *C.* to give them a bill at two months, at the time of *A.* & Co.'s commission.

Held, that in an action, brought upon the guarantee, against *A.* and Co., their certificate was a good defence, by virtue of the statute of the 49th Geo. III. c. 121. *s. 9. Gaskell v. Lindsay. See contra*, by K. B. Page 212

4. In an action against the hundred Held, that they are only liable for things demolished by the rioters, or destroyed in the demolition of the house, and not for any goods stolen or lost from the premises. *Smith v. Bolton.* 201

(43 Geo. III. c. 58. s. 1.)

5. In an indictment upon the 43d G. III. c. 58. *Semble*, that the words "some other grievous bodily harm" must be construed to extend to such wounds only as are inflicted upon a vital part in the body. *Rex v. Akenhead.* 469

(5 Geo. II. c. 30. s. 45.)

6. See BANKRUPT, 9.

(18 Geo. II. c. 20.)

7. See JUSTICE OF PEACE, 1.

(52 Geo. III. c. 130. s. 1 and 2.)

BENNETT J. MOITA, 359.

8. See RIOT ACT, 1.

(21 Jac. I. c. 19.)

9. See BANKRUPT, 17.

SPECIAL CONTRACT,

See ASSUMPSIT, 4.

SPECIFICATION,

See PATENT, 1, 2.

STOPPAGE IN TRANSITU.

1. When the master of a ship re-

ceives goods on board, and gives a receipt for them, it is his duty not to deliver the bill of lading, except to the person who can give the receipt in exchange. *A.* sells goods to *B.* to be delivered free on board a particular ship: he loads them on board, and takes a receipt from *C.*, which purports that the goods were received "for and on account of *A.*" Before the delivery, *B.* had sold the goods to *D.*, who, without the knowledge and consent of *A.*, obtains a bill of lading from *C.* *B.* becomes insolvent.—Held, that *A.* is entitled to stop the goods *in transitu*, and that *C.* having refused to deliver them on the production of the receipt, is answerable to *A.* in an action of trover. *A.*'s right would have been the same, although the receipt had not contained the restrictive words, but had been in the general form. *Craven v. Ryder.* Page 100

2. An order sent by the vendor to the wharfinger to deliver the goods to the vendee, is sufficient to pass the property to the vendee, provided nothing remains to be done but to make the delivery: but if any thing remain to be done, for example, weighing, &c. the property does not pass, and the right of stoppage *in transitu* is not defeated till that be done. *Withers v. Lys.* 18

3. *A.* being in bad circumstances goes to *Glasgow*, and obtains goods from *B.*, paying for them by a bill upon a house in *London*, which house he knows to be insolvent. The goods are shipped at *Leith*; the invoice and receipt made out to *A.*; and they are afterwards delivered to a wharfinger in *London*, who receives a notice from the original vendor (*B.*) to hold them for him. *A.* becomes a

bankrupt. In trover by *A.* against the wharfinger for the benefit of his assignees;—Held, that *B.*'s right of stoppage *in transitu* was gone; but that there might still be a question for the Jury, whether the sale was not made under such gross circumstances of fraud as to vacate the contract altogether. *Noble v. Adams.*

Page 248

4. *A.*, in London, orders goods of *B.* at Manchester; *B.* forwards them by a carrier to London. Whilst they are on their transit, *B.* hears of *A.*'s insolvency, and directs the carriers to stop them; and for this purpose he makes out a new invoice to *D.*, which he transmits to the office of the carrier in London. The goods, by a mistake of the carrier, are delivered to *A.*, who becomes a bankrupt; his assignees claim to retain them.—Held, that *B.* had a right to recover them in an action of trover against the assignees of *A.* *Litt v. Cowley.* 338

SUBPÆNA,

See EVIDENCE, 2.

The name of a witness, though not in the original subpœna, may be inserted therein at any time, if she have been regularly served with a copy. *Wakefield v. Gall.* 526

T.

TENANT AT WILL.

Tenant at will is not liable to general repairs; he is bound to use the premises in a husbandlike

manner, but no farther. *Horsefall v. Mather.* 7

TRESPASS.*

1. In an action of trespass for false imprisonment, a constable may justify under the general issue, though he acted without a warrant, provided there were a reasonable charge of felony made; although he afterwards discharges the prisoner without taking him before a magistrate; and although it should turn out in fact that no felony was committed. But a private individual, who makes the charge, and puts the constable in motion, cannot justify under the general issue: he must plead the special circumstances, by way of justification, in order that it may be seen whether his suspicions were reasonable. *M'Cloughan v. Clayton.* Page 478
2. In trespass, there are two independent parishes in one district, as *St. John's* and *St. James's*, in *Clerkenwell*; if the trespass be stated to have been committed in *Clerkenwell*, generally, and be proved to have been committed in the parish of *St. James's*, it is a fatal variance. *Taylor v. Hooman.* 523

TRUSTEE.

No action at law will lie against trustees, either by their *cestui que trust*, or, in case of his bankruptcy, by the assignees of such *cestui que trust*. *Allen v. Imlett.* 641

TROVER,

See BANKRUPT, 12, 15.

A letter from the plaintiff's attorney to the secretary of the *West India*

Dock Company, claiming the delivery of some coffee, in the possession of the company, at their docks, adding, "that he was instructed to take legal measures, if it were not delivered forthwith," is not a notice of action within the meaning of the 39th Geo. III. c. 69. s. 185.; the act which incorporates the company. *Quære*, if the notice of action should not be to the treasurer of the company? *Lewis v. Smith.* Page 27

TOLLS,

See ASSUMPSIT, 7.

V.

VARIANCE,

See BANKRUPT, 2. TRESPASS, 2.

VENDOR AND PURCHASER,

See AUCTIONEER AND ASSUMPSIT.

U.

USAGE.

1. An usage of trade cannot be set up to contravene an express contract. Therefore, when *A.* agreed to sell to *B.* a quantity of bacon, which he warranted to be of a particular quality, part of which *B.* weighed and examined upon delivery at the wharfinger's, and paid for the whole by a bill at two months, but before the bill became due, gave notice to *A.* that the bacon was not agreeable to the contract, —Held, that *B.* could not give in evidence a custom in the bacon trade, that the buyer was bound to reject the contract, if dissatisfied therewith, at the time of examining the commodity; and that,

having neglected to do so in the first instance, he was excluded from future objections. *Yeats v. Pim.* Page 95

USE AND OCCUPATION.

Though an agreement for use and occupation is void by the statute of frauds, nevertheless, if the tenant take possession of the premises under it, he becomes a tenant at will; and recourse may be had to the original agreement to calculate the amount of rent. *De Medina v. Polson.* 47

USURY.

1. *A.*, in consideration of a certain sum of money, conveys premises to *B.*, and, at the same time an agreement is entered into between them that *A.* shall re-purchase the same premises, within fifteen months, at a considerable advance upon the original purchase-money; and *B.* agrees to sell and re-convey at such advance.—Held that, in point of law, such contract was not usurious, unless it were meant as a cover for a loan of money, which was a question of fact for the Jury. *Metcalf v. Brown.* 295
2. *A.* employs *B.* to get a bill discounted, and agrees to give him a sum of money beyond the legal interest. *B.* procures *C.* to discount it, who requires *B.* to indorse the bill, but takes no more than the legal interest upon the discount. *B.* then pays over to *A.* the proceeds of the bill, minus the sum which *A.* had agreed to give him for procuring the discount.—Held that, in an action against *A.*, brought by the indorsee of *C.*, *A.* could not defend himself on the ground of usury

between him and B. *Jones v. Davison.* Page 256

W.

WARRANTY,

See PRINCIPAL AND AGENT.

Crib-biting is no such unsoundness in a horse, as to entitle a purchaser, who has bought under a *general* warranty, to maintain an action for the breach of it, upon this fault only. *Broennenburgh v. Haycock.* 630

WAGER.

1. A. lays a wager of twenty-five guineas with B. upon the event of a horse-race, and C. takes the risk of ten guineas (part of the twenty-five) as his share of it. A. wins the wager; but, before he receives the money from B., he pays C. ten guineas, as his portion of the bet. B. never paid the wager to A., and all hope of obtaining it was lost.—Held, that A. was entitled, notwithstanding the statutes of gaming, to maintain an action of money had and received against C. for the ten guineas which he had paid him. *Simpson v. Bliss.* 732

WITNESS.

1. A. who is indebted to B., gives him a bill of C. to get discounted. B., instead of discounting it, holds the bill as a security for the debt of A., contending that A. gave it to him by way of payment of his debt. In an action upon this bill, brought by B. against C., A. is not a competent witness to prove, on the part of the defendant, that he delivered the bill to B. merely to get it discounted, not as payment, without a release. Because,

in the event of the plaintiff's recovering, he would be liable to the costs of the action brought against C., as *special* damage in an action against himself for the violation of his duty. *Harman v. Lasbrey.* Page 390

2. Where a witness is examined on interrogatories by the plaintiff, and cross interrogatories on the part of the defendant, although it should appear when his evidence is read at the trial that he was an interested witness, and ought to have been released; his evidence, notwithstanding, may be read, without proving him to have been released previously to such examination. The objection is too late at the trial; and should have been made at the time he was examined. *Ogle v. Paleski.* 483
3. When a witness's character is attacked in a court of justice, the questions should be confined to his general conduct, and should not point at specific charges. *Sharp v. Scoging.* 517
4. The examination of a prisoner before a magistrate, who examines such prisoner as a *witness*, although he holds out no threat or inducement, cannot be used against him. *Rex v. Wilson.* 597
5. It is an objection to the competency of a witness, who comes to discharge certain premises from a rate, that he has property of the kind in question, in the occupation of a tenant, subject to such rate, if established: and, therefore, his own reversionary interest may be affected thereby. *Rhodes v. Ainsworth.* 619

WRIT.

In an indictment under Lord *Ellenborough's* act, for cutting and maiming a sheriff's officer, it is in-

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ERRATA :

For Farmer v. Joseph, p. 451. tried at York Summer Assizes, 1816, read Revill v. Satterfit. P. 627, line 18, for "rights of a course of justice," read "rights of a court of justice."



